Supreme Court, U.S.
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No. 91-1017

In the
Supreme Court of the United States

OCTOBER TERM, 1991

REGINALD H. HOWE,
PETITIONER,

v.

GOLDCORP INVESTMENTS LTD., ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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December 20, 1991

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

(1) Whether the special venue provision of the Securities Exchange Act of 1934, which also mandates exclusive federal jurisdiction, precludes dismissal for *forum non conveniens* of a private action under Section 10(b) and Rule 10b-5 by a U. S. shareholder of a foreign investment company on behalf of himself and the company's U. S. and other shareholders.

(2) Whether *forum non conveniens* may be applied in an action arising under federal law to deprive an American citizen and resident of redress in the U. S. federal courts. This is a question that, in the admiralty context, this Court expressly left open in *Swift & Company Packers* v. *Compania Columbiana del Caribe*, 339 U.S. 684, 697 (1950).

(3) Whether a foreign closed-end investment company may use the U. S. mails and other jurisdictional means to redistribute 5 million of its existing publicly traded shares to 2500 U. S. residents without registering under the Investment Company Act or obtaining an exemption therefrom.

PARTIES TO THE PROCEEDING

In addition to the party named in the caption, the following persons, corporations and partnership were defendants in the district court, appellees in the court of appeals, and are respondents in this Court:

CSA Management Ltd.
David Sidney Beatty
Sidney Frank Chapman
John Cameron Gray
Robert Ross McEwen
James Randolph Mullins
James Douglas Norris
Donald Haldenby
Robert Peter Simon
Dickenson Mines Ltd.
Kam-Kotia Mines Ltd.
Wharf Resources Ltd.
John O. Kachmar
Douglas A. Sloan
Tory, Tory, DesLauriers & Binnington
Charles F. Scott
James E. A. Turner
RBC Dominion Securities Inc.

The Securities and Exchange Commission (the "SEC") appeared as *amicus curiae* in the court of appeals urging reversal of the district court's decision dismissing the case for *forum non conveniens*. Summarizing its interest and position, the SEC stated (*amicus* brief at p. 5):

> Application of the doctrine of *forum non conveniens* in federal securities laws actions against foreign issuers could impair the ability of U. S. shareholders to obtain relief under the federal securities laws and

could, therefore, undermine the effectiveness of private actions enforcing those laws. This result would be particularly troublesome in view of the increasing amount of cross-borders securities trading and the correspondingly increased likelihood that, if the district court decision is not overturned, defrauded U. S. investors will find it more difficult to bring actions against foreign issuers in U. S. courts even where the requirements of subject matter and personal jurisdiction clearly are satisfied. Moreover, since the same venue provisions govern enforcement actions brought by the Commission as well as actions brought by private plaintiffs, the outcome of this appeal could also affect the Commission's ability to enforce the federal securities laws.

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The appendix to this petition is cited as "A." The appendix in the First Circuit consisted of three volumes, which are cited here as "CA1 App.I," "CA1 App.II" and "CA1 App.III." The First Circuit requires certain materials to be included in an addendum to the appellant's brief. This addendum is cited here as "CA1 Add." Citations to parts of the plaintiff's principal affidavit not included in the appendix in the First Circuit are to "P.Aff." followed by the relevant page or exhibit number.

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OPINIONS BELOW

The opinion of the court of appeals (A. 1a-24a) is reported at 946 F.2d 944. The opinion of the district court (A. 25a-30a) and the magistrate's recommendation (A. 31a-37a) are not reported.

JURISDICTION

The decision of the court of appeals was entered on September 27, 1991. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Relevant provisions of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78a, *et seq.*, including § 12(g) (registration by issuers engaged in interstate commerce), 15 U.S.C. § 781(g), and § 27 (jurisdiction and venue), 15 U.S.C § 78aa, and of the Investment Company Act of 1940 (the "Investment Company Act"), 15 U.S.C. § 80a-1, *et seq.*, including § 7(d) (foreign investment companies), 15 U.S.C. § 80a-7(d), and § 44 (jurisdiction and venue), 15 U.S.C. § 80a-43, are reproduced in Appendix D (A. 38a-42a).

STATEMENT OF THE CASE

This is an action by a Massachusetts citizen,[1] individually and on behalf of a class of similarly injured shareholders, primarily against a closed-end Ontario investment company,

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[1] The plaintiff (petitioner in this Court) is registered as an investment advisor with the SEC (CA1 App.I 9-10). At the time of the takeover at issue, he personally owned 10,000 Goldcorp shares and his investment advisory clients (all American citizens) owned collectively over 20,000 Goldcorp shares (P.Aff. 74). The alleged damages are not less than approximately $3.00 per share (CA1 App.I 54-55).

Goldcorp Investments Ltd. ("Goldcorp"), based in Toronto.[2] The principal claims arise under § 10(b) and Rule 10b-5 of the Exchange Act and § 7(d) of the Investment Company Act (A. 5a-6a). At all times material to this litigation, Goldcorp had approximately 2500 U. S. shareholders holding some 5 million shares (A. 4a, 19a; CA1 App. I 128-129). Goldcorp did not contest U. S. jurisdiction.

The Disputed Change in Investment Policy. From 1983 to March/April 1989, the date of the takeover at issue, Goldcorp claimed to offer investors "an opportunity to invest in a managed portfolio of gold bullion and gold mining investments" (CA1 App.I 15-16). During this time about half its assets were invested in gold bullion and the rest in a diversified portfolio of shares of major gold mining companies (CA1 App.I 135).

In 1987, in an effort to try to reduce the discount to net asset value at which its shares generally traded,[3] Goldcorp sought and obtained shareholder approval for certain changes in the investment restrictions contained in its articles of incorporation (A. 5a). Specifically, it sought authorization, *inter alia*: (1) to own more than 10 percent of any class of securities of a single issuer; (2) to invest more than 10 percent of its assets in the securities of a single issuer; and (3) to use borrowed funds to purchase securities (A. 5a; CA1 App.I 137-138).

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[2] The other defendants are: Goldcorp's manager, CSA Management Ltd. ("CSA"); three related Canadian corporations now controlled by Goldcorp: Dickenson Mines, Ltd. ("Dickenson"), Wharf Resources, Ltd. ("Wharf") and Kam-Kotia Mines, Ltd. ("Kam-Kotia"), collectively the "Dickenson group" of companies; Goldcorp's former Toronto law firm; the financial adviser to the Dickenson group; and various individuals, including the president of Goldcorp and CSA and certain directors of Goldcorp.

[3] Shares of closed-end funds commonly trade in the market at prices that vary, sometimes significantly, from their net asset value (CA1 App.I 16-17). Prior to 1987, Goldcorp's shares generally traded at a discount to net asset value of 20 to 30 percent (CA1 App.I 136-137).

Goldcorp mailed proxy solicitation materials to the petitioner and its other American shareholders in the United States. Neither these materials nor any other materials released by Goldcorp prior to March 1989 disclosed or suggested that these changes were intended to, or did, authorize Goldcorp: (1) to cease being a diversified gold investment company; (2) to invest over 60 percent of its net assets in a single company or related group of companies; or (3) to borrow in excess of its capacity to service the new debt from current income (A. 6a; CA1 App.I 19-21, 138).

Believing that Goldcorp would continue to invest in a conservative, prudently diversified portfolio of gold and gold mining securities, the petitioner purchased additional Goldcorp shares in 1988 (CA1 App.I 23) and directed similar purchases for clients.

On March 17, 1989, Goldcorp announced "friendly" tender offers for two related Canadian gold mining companies, Dickenson and Kam-Kotia, to compete with hostile offers previously made by Corona Corp., a major Canadian gold mining company (A. 5a). Dickenson was a small to medium sized gold mining company with effective control over Kam-Kotia, a related holding company, and an approximately 35 percent interest in Wharf,[4] another small Canadian gold mining company. Corona owned a 7.6 percent interest in Wharf. Wharf's

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[4] The shares of Corona and Dickenson are listed on the Toronto and American stock exchanges (CA1 App.I 14; P.Aff. 49); the shares of Wharf are listed on the Toronto Stock Exchange and trade on NASDAQ in the United States (P.Aff. 52). As a result of cross-border arbitrage, the markets in the shares of Corona, Dickenson and Wharf are effectively single markets spanning both Canada and the United States (P.Aff. 49, 52). The shares of Kam-Kotia were listed only in Toronto (CA1 App.I 14).

Shares listed on the Toronto or Montreal stock exchanges are easily purchased by American investors either through U. S. brokerage firms, many of whom have correspondent relationships with Canadian brokerage firms, or through Canadian brokerage firms directly.

principal business is mining gold in Lead, South Dakota (CA1 App.I 15). Its South Dakota mine is considered by many mining analysts the "crown jewel" in the Dickenson group (P.Aff. 63).

Goldcorp's offers, like Corona's, were directed to the American as well as Canadian shareholders of Dickenson and Kam-Kotia, and both Goldcorp and Corona made the required filings under §§ 13 and 14 of the Exchange Act (A. 4a; CA1 App.I 14, 145; P.Aff. 47; CA1 App.II, Ex. 19; CA1 App.III, Exs. 20, 24, p. 9). Goldcorp also hired an information agent to promote its offers in the United States.

By its tender offers, Goldcorp proposed to invest more than 60 percent of its net assets in the Dickenson group (CA1 App.I 154-155), and to finance the takeover initially with a large bank loan (CA1 App.I 26). The impact of Goldcorp's offers on the market price of its own stock was dramatic (A. 5a): an immediate decline from about C$6.00/6.25 per share on the Toronto Stock Exchange to C$5.00 (CA1 App.I 30, 138-139), increasing the discount to net asset value from 30 percent to 40 percent.

Goldcorp's tender offers were successfully completed on April 14, 1989. Again, the effect on the price of Goldcorp's shares was pronounced (A. 5a): this time a decline from around C$5.00 to C$3.50/4.00 within a few weeks of the takeover (CA1 App.I 33, 139-140; P.Aff. 41). The net asset value also fell from C$9.08 per share on April 13, 1989, to C$7.70 one week later, as the takeover premium was quickly washed out of the Dickenson and Kam-Kotia shares acquired by Goldcorp. On June 1, 1989, the net asset value was C$6.87, and the shares closed on the Toronto Stock Exchange at C$3.40, a discount to net asset value in excess of 50 percent (CA1 App.I 33).

Goldcorp's U. S. Shareholders and Activities. At all times material to this litigation, Goldcorp had more than 1000 registered U. S. shareholders, holding collectively some 5 million

shares, or almost one-third of its outstanding public shares (A. 4a; CA1 App.I 128-129). Because one of these registered holders (CEDE & Co.) is a large share depository institution in New York, the actual number of individual U. S. holders is reliably estimated at 2500 (A. 19a; CA1 App.I 128-129).

Goldcorp's shares trade on the Toronto and Montreal stock exchanges. Unlike some other foreign closed-end investment companies based in Canada and elsewhere (CA1 App.I 130), Goldcorp has never imposed any restrictions on the redistribution of its shares to U. S. residents, and has willingly and voluntarily registered U. S. citizens as shareholders and mailed corporate communications to them in the United States (A. 3a-4a; CA1 App.I 129-130).

What is more, officers and employees of Goldcorp and CSA, its manager, have regularly promoted the redistribution of Goldcorp's shares to U. S. residents (A. 4a; CA1 App.I 131-135). In this regard, they have: (1) routinely responded to inquiries from potential U. S. investors by mailing them copies of the original prospectus, annual and quarterly financial reports, management information circulars and, on occasion, brokerage house reports; (2) placed U. S. brokerage houses and investment advisory services on lists to receive regular mailings of corporate reports, press releases and other promotional pieces, including materials not regularly sent to shareholders; (3) communicated by letter and telephone with U. S. shareholders and potential investors who have complaints or

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[1] Unless otherwise stated, all references to Goldcorp's shares are to its publicly traded Class A shares, which have restricted voting rights. All its common shares with full voting rights are owned by CSA, its manager. Goldcorp did not register its 1983 public offering of Class A shares in the United States under the Securities Act of 1933, 15 U.S.C. § 77a, *et seq.*, and claims not to have sold any shares to U. S. residents during the offering period (CA1 App.I 128).

questions about Goldcorp; and (4) assisted institutional investors based in the United States in finding large blocks of Goldcorp shares for purchase.

By reason of its large number of U. S. shareholders, Goldcorp must register its shares under § 12(g) of the Exchange Act or make the filings necessary to obtain an exemption from registration under § 12(g)(3) and Rule 12g3-2(b), 17 CFR 240.12g3-2(b).[6] Goldcorp has never registered as a foreign investment company under § 7(d) of the Investment Company Act or obtained any exemption therefrom (CA1 App.I 149-150).[7]

Since the takeover, Goldcorp has purchased additional shares of Wharf, and as of April 1991 owned directly and through Dickenson a 51 percent interest in Wharf. In 1990, the president of Goldcorp and CSA appointed himself CEO of Dickenson and Wharf, touching off a proxy fight for two

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[6] Goldcorp's name appears sporadically on the SEC's list of foreign issuers that have submitted the information necessary to qualify for the Rule 12g3-2(b) exemption. See 54 Fed. Reg. 41531, 41536 (October 10, 1989) (included); 56 Fed. Reg. 7424, 7430 (February 22, 1991) (included); 53 Fed. Reg. 27418, 27424 (July 20, 1988) (not included). By the terms of the statute itself, an exemption under § 12(g)(3) and Rule 12g3-2(b) is an exemption from registration only; it is not an exemption from the antifraud provisions of the Exchange Act.

[7] In 1989, prior to its tender offers, Goldcorp made a rights offering for share purchase warrants (A. 4a; CA1 App.I 147). The terms of the warrants did not comply with §§ 18(d) and 23(b) of the Investment Company Act (CA1 App.I 149). Accordingly, the rights and warrants were listed in Canada but not registered in the United States under the Securities Act of 1933 or the Investment Company Act and not issued to Goldcorp's U. S. shareholders (CA1 App.I 147-148; P. Aff. Ex. H-1). Instead, their rights were issued to a Canadian trust company, which sold them in the market and distributed the proceeds to the U. S. shareholders. However, Goldcorp used the U. S. mails to send the offering circular (CA1 App.III, Ex. 31) to its U. S. shareholders together with a letter explaining how they would be treated (P. Aff. Ex. H-1), and to answer numerous questions about the rights offering from them (CA1 App.I 147-148). Indeed, because Goldcorp had so many American shareholders, the rights offering could not be effected without using the U. S. mails (CA1 App.I 150-151).

seats on Goldcorp's board and related mailings by both management and the dissident directors to Goldcorp's U. S. shareholders (CA1 App. 182-184).

Litigation in Canada. Securities laws in Canada are primarily provincial (CA1 App.I 85-86). Neither Canada nor Ontario has any comprehensive antifraud provision comparable to § 10(b) of the Exchange Act and Rule 10b-5 (CA1 App.I 99-100).[8] What is more, "in practice, damage claims may not be prosecuted in Canada by way of class action." M. Q. Connelly, "Multinational Securities Offerings: A Canadian Perspective," 50 *Law & Contemp. Prob.* 251, 267-268 & n.90 (1987), and authorities cited. Ontario does not have a contingency fee plaintiffs' securities bar, and it follows the British rule on liability for attorneys' fees.

Goldcorp expressly reserved the right to withdraw its tender offers in the event of litigation challenging its authority to make them (CA1 App.II, Ex. 19, pp. 11-12). Corona promptly filed suit in Ontario for a temporary injunction barring completion of Goldcorp's offers.[9] This motion was denied on April 13, 1989 (CA1 App.I 30-31).

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[8] Exclusive jurisdiction of all causes of action arising under the Exchange Act is vested in the U. S. federal courts. 15 U.S.C. § 78aa. In any event, because the Exchange Act carries criminal penalties as well as civil, no Canadian court would likely apply it. See *Industrial Investment Development Corp.* v. *Mitsui & Co.*, 671 F.2d 876, 891 (CA5 1982), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).

[9] The suit was primarily against Goldcorp, Dickenson, Kam-Kotia, Wharf and various related persons and entities. Corona's principal allegation was that it had not received a fair opportunity to participate in the auction process triggered by its initial offers (CA1 App.I 30-31; CA1 App.III, Ex. 22). Corona also alleged, as holder of 1000 Goldcorp shares, that Goldcorp's tender offers violated its investment purpose and policies. However, Corona did *not* allege that it had purchased its Goldcorp shares prior to announcement of Goldcorp's tender offers, or that it had suffered any damages from a decline in the price of the shares. In addition to the preliminary injunction, Corona sought damages of C$50 million (Ex. 22, p. 7). The damage claims were settled in late 1991.

The U. S. Litigation. The petitioner also promptly threatened litigation in the United States on behalf of Goldcorp's shareholders (CA1 App.I 30, 32-33, 56-60; P.Aff. 40, 50; Ex. K),[10] and filed his original complaint on June 8, 1989, and an amended complaint on August 24, 1989.

The principal allegations of the amended complaint are (A. 5a-6a): (1) claims under § 10(b) and Rule 10b-5 of the Exchange Act relating to misrepresentation of Goldcorp's investment purpose and policies (CA1 App.I 34-37); and (2) claims under the Investment Company Act (CA1 App.I 48-53), including failure to register as a foreign investment company under § 7(d), misrepresentation of investment policies under § 13, and breaches of fiduciary duty involving self-dealing and personal misconduct under § 36(a).[11] The latter include excessive fees paid by Goldcorp to CSA after the takeover and purchases of Goldcorp shares by CSA at the low prices and large discount to net asset value caused by the takeover.

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[10] In its tender offers (CA1 App.II, Ex. 19; CA1 App.III, Ex. 20) mailed to all Dickenson and Kam-Kotia shareholders, copies of which were filed with the SEC as required by §§ 13 and 14 of the Exchange Act, Goldcorp failed to disclose that any significant question existed about its authority to make the offers (A. 6a). Following the filing of Corona's suit, Goldcorp amended its SEC Schedules 13D and 14D-1 by filing copies of the complaint (CA1 App. III, Ex. 22) and letters from counsel for both Corona and Goldcorp to the Ontario Securities Commission (CA1 App. III, Exs. 23, 24). Neither these filings nor notices of them were mailed to the American or Canadian shareholders of Dickenson or Kam-Kotia, and Goldcorp made no other disclosure of the substance or seriousness of the issues raised regarding its authority to make the offers (P.Aff. 51-52). Dickenson and Kam-Kotia each mailed a Directors' Circular dated March 17, 1989, to their shareholders recommending acceptance of Goldcorp's offers (CA1 App. II, Ex. 11; CA1 App.III, Ex. 21). These solicitation/recommendation statements were filed with SEC on Schedule 14D-9. Neither statement disclosed that there was any issue with regard to Goldcorp's authority to make the offers, and neither was ever amended even to reflect the existence of Corona's suit (CA1 App.I 42; P.Aff. 51-52, 65).

[11] Other counts allege common law deceit and misrepresentation, common law breach of fiduciary duty, aiding and abetting violations of the antifraud provisions of the federal securities laws, joint and several liability under § 20(a) of the Exchange Act, and violations Massachusetts unfair trade practices law, Mass. G. L. c. 93A, and the Ontario Business Corporations Act.

The complaint also alleges that Goldcorp's takeover of the Dickenson group marked the start of a continuing pattern of racketeering activity, in violation of RICO, 18 U.S.C. § 1961, *et seq.*, directed at securing for Goldcorp and its manager control of Wharf's U. S. gold mining operations.[12]

The defendants filed a joint motion to dismiss for *forum non conveniens* (CA1 App.I 61-62). The plaintiff filed a motion for partial summary judgment (CA1 App.I 125-126), requesting a declaration that Goldcorp violated the Investment Company Act by: (1) redistributing its shares in the United States without registering as a foreign investment company; and (2) violating important substantive provisions of the act designed to protect U. S. investors.[13]

The motions were referred to a magistrate, who recommended dismissal for *forum non conveniens* (A. 31a-37a). The plaintiff filed written objections (CA1 Add. 67-73). Without further hearing, the district court adopted the magistrate's recommendation (A. 25a-30a). The plaintiff then took an appeal to the First Circuit (CA1 App.I 206).

[12] The predicate offenses include violations of: § 10(b) and Rule 10b-5 of the Exchange Act; numerous sections of the Investment Company Act; § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (CA1 App.I 37-38); § 14(e) of the Exchange Act relating to tender offers (CA1 App.I 42; see *supra*, p. 8 n.10); and federal mail and wire fraud laws (CA1 App.I 44-45).

[13] It is undisputed that Goldcorp's structure and operations never complied with important substantive provisions of the Investment Company Act (CA1 App.I 149-155), including §§ 15(a) and 18 relating to capital structure (CA1 App.I 152), § 10 relating to composition of the board of directors (CA1 App.I 152-154), and §§ 18(d) and 23(b) relating to warrants (CA1 App.I 149). In addition, its use of borrowing in connection with the Dickenson takeover exceeded the margin limits specified by §§ 12(a) and 18 (CA1 App.I 154-155).

***The Decision of the Court of Appeals* — Forum Non Conveniens.** The First Circuit affirmed the district court's dismissal for *forum non conveniens*, holding that "the balance of conveniences favors suit in Canada" (A. 20a). It rejected the petitioner's argument, supported by the SEC, that the doctrine is inapplicable as a matter of law in actions under the antifraud provisions of the federal securities laws (A. 7a-13a). In this connection, it held that this Court's decision in *United States* v. *National City Lines, Inc.*, 334 U.S. 573 (1948) ("*National City Lines I*"), was inapplicable (A. 9a-11a), and in any event had been "simply overruled" by this Court's subsequent decision *United States* v. *National City Lines, Inc.*, 337 U.S. 78 (1949) ("*National City Lines II*") (A. 11a).

The First Circuit also rejected the petitioner's argument, also supported by the SEC (*amicus* brief at pp. 28-40), that the doctrine, even if legally applicable, had been misapplied by the district court in a manner constituting an abuse of discretion (A. 13a-20a). In this regard, the court of appeals held that to reverse for abuse of discretion here would as a practical matter foreclose use of the doctrine in most securities actions by Americans against foreign issuers (A. 19a), but failed to recognize the converse of this proposition: that to uphold use of the doctrine here would invite and authorize its use in virtually all such actions.

***Investment Company Act*.** Although embellished with a considerable amount of *dicta* (A. 20a-22a), the First Circuit's decision that the Investment Company Act was inapplicable in this case rested entirely on its holding, citing this Court's decision in *United States* v. *Naftalin*, 441 U.S. 768, 777-778 (1979), that the redistribution of Goldcorp's shares in the United States did not constitute a "public offering" within the meaning of § 7(d) of the Investment Company Act (A. 23a).

REASONS FOR GRANTING CERTIORARI

Misapplying *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), and in direct conflict with this Court's decision in *National City Lines I*, the First Circuit's decision below establishes a novel, dangerous and far-reaching precedent: that federal judges may use the vague and discretionary doctrine of *forum non conveniens* to deny the protection of the federal securities laws to U. S. citizens notwithstanding the special venue and exclusive jurisdiction provisions contained in those laws.

If the court below is correct, this power may be exercised in almost any situation where American investors are victimized by foreign issuers, and without regard to the lack of a comprehensive antifraud provision in the alternative foreign forum similar to Section 10(b) and Rule 10b-5 or the practical difficulties that individual Americans face in litigating in foreign countries, such as the absence of contingency fees and class action remedies. Nor does it make any difference that the interests of 2500 American shareholders, holding collectively 5 million shares in a foreign company indisputably subject to U. S. jurisdiction, are at stake.

Most startling of all, if the First Circuit is correct, this power may be exercised even when the SEC appears as *amicus* to urge that the case is appropriate and necessary for the protection of American investors and that it would be an abuse of discretion not to hear it.

Unless reversed by this Court, the First Circuit's decision — at a time of greatly increased international securities trading — threatens to cripple enforcement of the federal securities laws against foreign issuers. What is more, it threatens similar results in other areas subject to federal regulation.

I. THE DISMISSAL FOR *FORUM NON CONVENIENS* REPRESENTS AN UNPRECEDENTED USE OF THAT DOCTRINE TO DENY TO AMERICAN INVESTORS, SUPPORTED BY THE SEC, THE PROTECTION OF THE ANTIFRAUD PROVISIONS OF THE SECURITIES EXCHANGE ACT.

A. *The First Circuit's Holding that Actions under Section 10(b) and Rule 10b-5 by U. S. Shareholders against Foreign Issuers May Be Dismissed for* Forum Non Conveniens *Is Inconsistent with this Court's Decision in* National City Lines I *and Similar Decisions by Other Circuits.*

Stating in *National City Lines I* that *forum non conveniens* "is not a principle of universal applicability," this Court set forth "one invariable, limiting principle" (334 U.S. at 596-597):

> It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. The question whether such a right has been given is usually the crux of the problem. . . . It is . . . to be decided, upon consideration of all the relevant materials, by whether the legislative purpose and the effect of the language used to achieve it were to vest the power of choice in the plaintiff or to confer power upon the courts to qualify his selection.

Citing the remedial purposes of the Clayton Act and the express intent of Congress to enlarge venue for private plaintiffs in suits brought under it, the Court prohibited use of the "vague

and discretionary power comprehended by *forum non conveniens*" (*id.* at 581) to effect domestic transfers of Clayton Act cases. *Id.* at 597. See *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 505 (1947) (for purposes of *forum non conveniens* distinguishing cases brought under a "special venue act" from "others governed by the general venue statutes"), and cases cited.

The broad venue provision in § 27 of the Exchange Act, which permits suit in any district "wherein any act or transaction constituting the violation occurred" (A. 39a-40a), is at least as inconsistent with the application of *forum non conveniens* as the venue provision in the Clayton Act.[14] *Pioneer Properties, Inc.* v. *Martin*, 557 F. Supp. 1354, 1362 (D. Kan. 1983), *appeal dismissed*, 776 F.2d 888 (CA10 1985) (*forum non conveniens* should not be used to defeat intent of Congress as expressed in liberal venue provisions of federal securities laws). *SEC* v. *Wimer*, 75 F. Supp. 955, 963-965 (W.D.Pa. 1948) (same). See *Leroy* v. *Great Western United Corp.*, 443 U.S. 173, 188-189 (1979) (White, J., dissenting); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 156 (1976). What is more, the express provision in § 27 of the Exchange Act vesting exclusive jurisdiction of all claims arising under the act in the federal courts (A. 39a) underlines and heightens this inconsistency. See *Finkielstain* v. *Seidel*, 857 F. 2d 893, 896 (CA2 1988).

National City Lines II did not, as the First Circuit stated (A. 11a), "simply overrule" *National City Lines I*. Rather, this Court held that "the legislative purpose and the effect" of 28 U.S.C. § 1404(a), enacted in 1948 after the decision in *National City Lines I*, was to authorize domestic transfers between

[14] Section 27 of the 1934 Act is broader than § 22 of the 1933 Act, 15 U.S.C. § 77v, but both are modeled on § 12 of the Clayton Act. *Leasco Data Processing Corp.* v. *Maxwell*, 468 F.2d 1326, 1340 n.10 (CA2 1972). The First Circuit ignored the relevant legislative history of the 1933 Act showing that Congress rejected more restrictive venue requirements. Compare H.R. 5480 (§ 21(a)), 73d Cong., 1st Sess. (1933), with S. 875 (§ 9), 73d Cong., 1st Sess. (1933). See H.R. Rep. No. 152, 73d Cong., 1st Sess. (1933) (Conference Report), p. 27.

the federal district courts of all civil actions, both those governed by the general venue provision and those, such as Clayton Act cases, governed by special venue provisions. See also *Ex parte Collett*, 337 U.S. 78 (1949), and *Kilpatrick* v. *Texas & Pacific Railway Co.*, 337 U.S. 75 (1949), decided the same day.

The First Circuit also failed to recognize, as this Court made clear in *Pope* v. *Atlantic Coast Line Railroad Co.*, 345 U.S. 379 (1953), that § 1404(a), which by its terms applies only to transfers between different federal courts, does not alter prior case law, including *National City Lines I*, as it relates to use of *forum non conveniens* in cases not governed by § 1404(a).

In *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981), this Court addressed use of *forum non conveniens* in a case by a foreign plaintiff based on federal diversity jurisdiction. By applying that sort of analysis in this case, the First Circuit, contrary to most other circuits, treated *National City Lines I* as no longer relevant even to cases by American plaintiffs against foreign defendants based on federal question jurisdiction and arising under statutes with special venue provisions. *Zipfel* v. *Halliburton Co.*, 832 F. 2d 1477, 1485-1487 (CA9 1987) (doctrine of *forum non conveniens* inapplicable to cases governed by the Jones Act), *cert. denied sub nom. Crowley Maritime Corp.* v. *Zipfel*, 486 U.S. 1054 (1988). *Needham* v. *Phillips Petroleum Co. of Norway*, 719 F.2d 1481, 1483 (CA10 1983) (same). *Szumlicz* v. *Norwegian American Lines, Inc.*, 698 F.2d 1192, 1195 (CA11 1983) (same). See *Industrial Investment Development Corp.* v. *Mitsui*, 671 F.2d 876, 890-891 (CA5 1982) (doctrine of *forum non conveniens* inapplicable to antitrust cases), *vacated and remanded on other grounds*, 460 U.S. 1007 (1983).[15]

[15] But see *In re Air Crash Disaster Near New Orleans*, 821 F.2d 1147, 1163 & n.25 (CA5 1987) (holding that "the principles enunciated in *Reyno* apply in all cases regardless of their jurisdictional bases or subject matter" and expressly overruling a string of prior decisions holding *forum non conveniens* inapplicable to Jones Act and other maritime cases governed by U. S. law), *vacated and remanded on other grounds*, 490 U.S. 1032 (1989); *Cruz* v. *Maritime Co. of Philippines*, 702 F.2d 47, 48 (CA2 1983) (similar); and

B. *The First Circuit's Holding that an Individual American Citizen May Be Denied Access to the Federal Courts on the Same Basis as a Foreign Citizen Is Incorrect and Inconsistent with the Decisions of this Court and Other Circuits.*

The issue here is not whether a foreign plaintiff should be remanded to the courts of his home country or whether an American plaintiff should be transferred to a different judicial district in the United States. Rather, it is whether a natural born American citizen and resident should be sent to the courts of a foreign country. In this circumstance, the presumption in favor of the plaintiff's home forum (*Piper*, *supra*, 454 U.S. at 255-256 & n.23) raises issues of fundamental due process and the right of access to the courts. See *Boddie* v. *Connecticut*, 401 U.S. 371, 374-376 (1971) (discussion of "access to the courts as an element of due process"); *Pesce* v. *Brecher*, 302 Mass. 211, 212 (1939) ("every individual is entitled to his own day in court"). As this Court noted in *Swift & Co. Packers* v. *Compania Colombiana del Caribe*, 339 U.S. 684, 697 (1950) (opinion by Frankfurter, J.):[16]

Lockman Foundation v. *Evangelical Alliance Mission*, 930 F.2d 764, 769 (CA9 1991) (dismissing for *forum non conveniens* case by an American plaintiff with Lanham Act claims). See also *Kempe* v. *Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (CA5 1989) (applying *forum non conveniens* to dismiss RICO claim by a foreign plaintiff but citing with approval and distinguishing *Mitsui*, *supra*), *cert. denied*, 493 U.S. 918; and *TransUnion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127, 130 (CA2 1987) (doctrine applicable to RICO claim by Philippine plaintiff).

[16] Courts have shown great reluctance to use *forum non conveniens* to deny individual American citizens redress in their country's courts. *E.g.*, *Reid-Walen* v. *Hansen*, 933 F.2d 1390 (CA8 1991) (abuse of discretion to dismiss for *forum non conveniens* personal injury action by American plaintiff hurt in Jamaican accident); *Wilson* v. *Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (CA7 1990), *cert. denied*, 111 S.Ct. 1415 (1991), citing *Lehman* v. *Humphrey Cayman, Ltd.*, 713 F.2d 339 (CA8 1983) (abuse of discretion to dismiss for *forum non conveniens* wrongful death suit on behalf of American plaintiff killed in Cayman Islands), *cert. denied*, 464 U.S. 1042.

The doctrine, which has a long history in admiralty cases, in one instance has been applied against a corporate American libelant. *Alcoa Steamship Co.* v. *M/V Nordic Regent*, 654 F.2d 147, 153-154 (CA2 1980), *cert. denied*, 449 U.S. 890 (with note that Justice Blackmun would grant certiorari). See also *Contact Lumber Co.* v. *P. T. Moges Shipping Co.*, 918 F.2d 1446 (CA9 1990) (noting that "[c]ourts have not agreed on whether U. S. plaintiffs are entitled to special deference in their selection of a U. S. forum" (at 1449), and remanding California corporate plaintiff to Indonesia in shipping dispute).

> We need not now decide the abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens. . . . Application of *forum non conveniens* principles to a suit by a United States citizen against a foreign respondent brings into force considerations very different from those in suits between foreigners. [Footnote and citations omitted.]

Thus, in a private action for securities fraud by an American plaintiff against Canadian individual and corporate defendants, the Second Circuit held that " 'positive evidence of unusually extreme circumstances' " and conviction that " 'material injustice is manifest' " is required for " 'deny[ing] a citizen access to the courts of this country.' " *Leasco Data Processing Equipment Corp.* v. *Maxwell*, *supra*, 468 F.2d at 1344, and cases cited. In sharp contrast, the First Circuit in this case treated the plaintiff's American citizenship as largely irrelevant and the real interest of the United States in protecting its citizens against securities fraud as almost so (A. 19a).[17]

Unless reversed by this Court, the First Circuit's decision will have far-reaching consequences. Its *Piper*-based analysis does not identify a single factor unique to this case that would distinguish it from most other securities fraud cases by Ameri-

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[17] Excluding admiralty and shipping cases (see *supra*, p. 15 n.16), almost all the recent cases dismissed for *forum non conveniens* by the federal courts in favor of the courts of a foreign country fall into two categories: (1) cases involving *foreign* plaintiffs trying to take advantage of more favorable U. S. laws or procedures (*e.g.*, *Piper*, *supra* (Scotish plaintiffs in suit over airplane crash in Scotland); *Kempe* v. *Ocean Drilling & Exploration Co.*, *supra*, 867 F.2d 1138 (Bermudian plaintiffs under RICO); *In re Air Crash Disaster Near New Orleans*, *supra*, 821 F.2d 1147 (Uruguayan plaintiffs); *TransUnion Corp.* v. *Pepsico, Inc.*, *supra*, 811 F.2d 127 (Philippine plaintiff under RICO); *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506 (S.D.N.Y. 1982) (Swiss plaintiff under Commodities Exchange Act)); and (2) cases enforcing freely negotiated forum-selection and choice of law clauses against American plaintiffs. *E.g.*, *Royal Bed & Spring Co.* v. *Famossul Industria*, 906 F.2d 45 (CA1 1990). See *Alcoa Steamship Co.* v. *M/V Nordic Regent*, *supra*, 654 F.2d at 158.

can plaintiffs, including the SEC, against Canadian or other foreign issuers (A. 15a-16a). A foreign company, by definition, will have its home office and ordinarily most of its relevant documents, personnel and witnesses located outside the United States. It will make most if not all its decisions relating to securities matters at its home office, usually at board level. It will issue most if not all its reports and other public information releases from its home office.

Contrary to this Court's decision in *Williams* v. *Green Bay & Western Railroad*, 326 U.S. 549, 554-557 (1946), the First Circuit also gave far too much significance to the fact that trial of this case would require delving into the internal affairs of a foreign corporation, and far too little to the fact that it is basically a case for money damages.

Accordingly, if the factors relied upon by the First Circuit to support application of the doctrine of *forum non conveniens* in this case are sufficient, virtually any foreign issuer charged with violations of the antifraud provisions of the federal securities laws could defend on the same basis. *Forum non conveniens* would become a routine defense in all such cases. American investors, including the SEC, would find it much more difficult to bring actions for securities fraud in U. S. courts against foreign issuers. And countries with less developed laws against securities fraud could easily become sanctuaries from which all manner of fraudulent schemes might be directed against American investors.

An unfavorable change in law may be given substantial weight if the remedy provided by the alternative forum is clearly inadequate or unsatisfactory. *Piper*, *supra*, 454 U.S. at 254-255. In this connection, the Court expressly noted in *Piper* (at 252 & n.18) that the American courts are "extremely attractive" to foreign tort plaintiffs due in part to U. S. practices regarding attorneys' fees.

It is one thing to deny these peculiarly American advantages to foreign plaintiffs. It is quite another to deny them to the very American citizens whom they are supposed to benefit.

This Court has recognized that private actions under § 10(b) and Rule 10b-5 of the Exchange Act are "an essential tool for enforcement of the 1934 Act's requirements." *Basic, Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988). Accord, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432 (1964). As a practical matter, these private actions could rarely if ever be brought on behalf of individual investors in the absence of: (1) contingency fees; (2) the American rule requiring each side to pay its own attorney's fees; and (3) class actions. All three of these uniquely American features of legal practice are necessary. The lack of any one of them would ordinarily be fatal except to the corporate or very wealthy plaintiff.

Ontario does not have a widely available class action remedy. *General Motors of Canada Ltd.* v. *Naken*, (1983) 1 S.C.R. 72. Of even greater practical importance, Ontario does not have a contingency fee plaintiffs' securities bar,[18] and it follows the British rule on liability for attorneys' fees. See *supra*, p. 7. To bring a case in Ontario, the petitioner would have to pay his own counsel from the outset as well as risk having to pay all the defendants' counsel should he lose. If this case is not heard in the United States, the simple fact is that it will not be heard at all because the petitioner cannot afford to bring it in Canada. See *Reid-Walen* v. *Hansen*, *supra*, 933 F.2d at 1399 ("absence of a contingent fee system system" and "inability to retain counsel in the alternative forum" militate against dismissal).

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[18] Mr. Justice Sopinka of the Supreme Court of Canada has recently suggested the use of contingency fees as a means to make legal services more widely available to individual Canadian citizens. See "All-or-nothing legal fees might keep costs down," *The Toronto Star*, November 18, 1991, p. A20.

C. *The First Circuit's Holding that Actions under Section 10(b) and Rule 10b-5 by U. S. Shareholders against Foreign Issuers May Be Dismissed for* Forum Non Conveniens *Is Inconsistent with the Basic Remedial Purposes of the Exchange Act.*

Contrary to the First Circuit's suggestion (A. 18a), this case does not set largely parochial interests of Massachusetts against national interests of Canada. It sets the national interest of the United States (expressed by Congress particularly in the Exchange Act) in preventing securities fraud against American citizens against primarily provincial interests of Ontario. The Exchange Act was enacted in large measure precisely because traditional common law and state law remedies for fraud were inadequate to deal with existing abusive practices in the trading of securities. 15 U.S.C. § 78b. Existing Canadian remedies for securities fraud are no more adequate, particularly for American citizens, than the common law and state law remedies that Congress sought to improve upon. See *supra*, pp. 7, 17-18.

"The anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has substantial effects within the United States." *Consolidated Gold Fields Plc.* v. *Minorco, S.A.*, 871 F.2d 252, 261-262, *as corrected*, 890 F.2d 569 (CA2 1989), and cases cited. Accord, *Zoelsch* v. *Arthur Andersen & Co.*, 824 F.2d 27, 30 (CADC 1987) (emphasizing (at 31) that the underlying purpose and intent of the Exchange Act is "the protection of American investors and markets" and (at 33) that Congress was "concerned with United States investors and markets").

The essence of the jurisdictional test applied in *Gold Fields* and endorsed in *Zoelsch* is ". . . whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave

the problem to foreign countries." *Bersch* v. *Drexel Firestone, Inc.*, 519 F.2d 974, 985 (CA2 1975), *cert. denied*, 423 U.S. 1018, cited in *Gold Fields*, 871 F.2d at 262. To dismiss for *forum non conveniens* a securities fraud case that "Congress would have wished" the federal courts to hear nullifies the basic remedial purpose of the Exchange Act: the protection of U. S. investors. It does precisely what the limiting principle on *forum non conveniens* announced in *National City Lines I* sought to prevent.

In a similar vein, the Fifth Circuit has noted that for purposes of *forum non conveniens* a distinction should be made between cases involving general legal principles recognized in some form in nearly every nation and those involving specific federal statutes reflecting a Congressional purpose to authorize private actions in an American court to vindicate a particular public policy of the United States. *Kempe* v. *Ocean Drilling & Exploration Co.*, *supra*, 876 F.2d at 1142-1143, citing *Industrial Investment Development Corp.* v. *Mitsui*, *supra*, 671 F.2d at 890-891 ("Defendants cannot use the rules of *forum non conveniens* as a substitute for the rules concerning the extraterritorial application of the [Sherman] Act.").

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[19] Like this case, *Gold Fields* involved a tender offer by a foreign holding company (Minorco) for the shares of a foreign mining company (Gold Fields) that had some U. S. shareholders and an interest in a U. S. gold mine. Reversing the district court's holding that the number of Americans owning Minorco stock was "insignificant" and that the effects on American shareholders were indirect, the Second Circuit stated (*id.* at 262):

> If in *Bersch* we could say that Congress intended American anti-fraud laws to apply to a transaction involving 41,936 shares owned by 22 American residents, then surely we must come to the same conclusion here, where American residents representing 2.5% of Gold Field's shareholders owned 5.3 million shares with a market value of about $120 million.

The First Circuit's subsidiary holding that dismissal for *forum non conveniens* was appropriate in this case to prevent unnecessary conflict between the securities laws of the United States and those of Canada is also in conflict with the Second Circuit's decision in *Gold Fields*. There the SEC urged the Second Circuit to find subject matter jurisdiction over the antifraud claims but to abstain from granting a remedy for reasons of international comity. 871 F.2d at 263, *as corrected*, 890 F.2d 569. The Second Circuit declined this suggestion, stating (871 F.2d at 263): "[The district court] should proceed to the merits and, if plaintiffs prevail, conduct additional fact-finding to determine whether an appropriate remedy, consistent with comity principles, may be fashioned in this case." The First Circuit gave no consideration whatever to whether principles of international comity applied at the remedy stage might be more effective in both protecting American investors and resolving any potential conflicts between the public interests of the United States and Canada than outright dismissal for *forum non conveniens*.

II. THE FIRST CIRCUIT'S HOLDING THAT THE INVESTMENT COMPANY ACT DOES NOT APPLY TO THE REDISTRIBUTION IN THE UNITED STATES OF THE PUBLICLY TRADED SHARES OF FOREIGN CLOSED-END INVESTMENT COMPANIES CREATES AN UNWARRANTED LOOPHOLE IN THE ACT THAT WILL INVITE ABUSES AGAINST AMERICAN INVESTORS.

As an unregistered foreign closed-end investment company,[20] Goldcorp facilitated, and frequently promoted, the redistribution of 5 million of its shares to U. S. investors (A. 4a; CA1 App.I 131-135). In so doing, it willingly registered as record shareholders more than 1000 U. S. residents, including a major U. S. depository institution holding shares in nominee name for approximately 1500 U. S. shareholders (A. 19a; CA1 App.I 128-129).[21]

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[20] Goldcorp was an investment company under § 3(a)(3) of the Investment Company Act and ICA Reg. 3a-1, 17 CFR 270.3a-1, from the first quarter of 1987 (prior to the changes in its investment restrictions) through the first quarter of 1989 because: (1) at all times it had more than 40 percent of its assets invested in securities, none of which were issued by majority-owned subsidiaries (CA1 Add. 75-76, 82); and (2) in every quarter it derived more than 45 percent of its gross income from dividends on these securities (CA1 Add. 76, 82). Also, Goldcorp was an investment company under §§ 3(a)(1) and 3(a)(3) of the act from 1983 through 1986 if its investments in gold bullion are excluded as a cash item, as they should be (CA1 Add. 77-80, 82). As a result of its takeover of the Dickenson group on April 14, 1989, Goldcorp at some point probably ceased to be an investment company as defined in the act since it became primarily a holding company for the Dickenson group and some 60 percent of its assets were then invested in these majority-owned subsidiaries (CA1 Add. 80).

[21] Goldcorp's 1989 rights offering provides another ground for holding it subject to the Investment Company Act. Because of Goldcorp's large number of American shareholders, its rights offering could not be effected without substantial use of the U. S. mails. Although Goldcorp did not mail actual rights or warrants to U. S. shareholders, it did mail them communications about the offering, including a letter from its president stating in part (P.Aff. Ex. H-1): "[Goldcorp] is not permitted under the United States Investment Company Act of 1940 to distribute the warrants to U. S. shareholders." It also mailed its U. S. shareholders checks representing the proceeds from the sale of the rights to which they were otherwise entitled. If this use of the mails is not "direct" within the meaning of § 7(d), it must be exactly the sort of stratagem that Congress meant to foreclose when it drafted § 7(d) also to prohibit "indirect" use of the mails by foreign investment companies.

The First Circuit's holding that § 7(d) of the Investment Company Act does not reach this sort of conduct creates a major loophole in the act that is contrary to both the literal language of § 7(d) and the purposes and intent of the act. What is more, this loophole is an invitation to foreign closed-end investment companies, possibly including domestic investment companies that reorganize under foreign law, to perpetrate on American investors the very abuses that the Investment Company Act was supposed to eliminate.[22] It does not take much imagination, in this era of instant communications and widespread international trading of securities, to see the attractiveness of such a loophole not just to sharp operators bent on fraud, but also to many closed-end investment company managers who in good faith view the Investment Company Act as overly onerous.[23]

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[22] Closed-end funds are not a new or novel concept that Congress failed to anticipate in 1940. Prior to 1929, virtually all investment companies were of the closed-end type, and in 1940 these were still the dominant variety although open-end funds were growing rapidly. See S. Rep. No. 1775, 76th Cong., 3rd Sess. (1940), pp. 2-3, 86 Cong. Rec. 10071.

[23] For example, it is common practice outside the United States to issue warrants running for up to three years to the initial purchasers of shares in a new closed-end fund. The intent is to compensate these purchasers for the discount that usually develops once the shares start trading, but the practice also can lead to very high levels of potential and actual dilution to subsequent purchasers. Sections 18(d) and 23(b) of the Investment Company Act effectively bar this practice. But if new closed-end funds could make their initial offering overseas to foreign investors and subsequently list or otherwise arrange for the redistribution of their shares in the United States, the act's restrictions on warrant dilution could be quite easily avoided without having to forego the large American market except during the initial offering. Indeed, this exact practice is frequently utilized by many foreign industrial companies, especially ones based in Canada (CA1 App.I 37-38).

A. *The First Circuit's Holding Is Not Supported by this Court's Holding in* United States v. Naftalin *or the Language or Purposes of the Act, and Is Inconsistent with the SEC's Previous Decisions and Practices under Section 7(d).*

Section 7(d) provides in relevant part that no foreign investment company "shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with a public offering, any security of which such company is the issuer" (A. 40a-41a).

The term "public offering" is not defined in the Investment Company Act. Under the Securities Act of 1933 and the Exchange Act, the term is taken to mean the offering of new shares by an issuer to the public, but not to include an offer or sale of securities in the course of ordinary market trading. *United States* v. *Naftalin*, 441 U.S. 768, 777-778 (1979). Relying almost exclusively on this Court's decision in *Naftalin*, which had nothing to do with the Investment Company Act, the First Circuit held that § 7(d) incorporates this same distinction (A. 23a), thereby rendering the act inapplicable to foreign closed-end investment companies that redistribute their shares into the United States in the aftermarket.

While the term "public offering" is not defined in the Investment Company Act or the securities acts of 1933 and 1934, the related term "issuer" is defined in all three statutes.[24] In

[24] The ALI's proposed *Federal Securities Code*, which uses the broader definition of "issuer" contained in the 1940 Act (ALI, *Federal Securities Code* (1980), § 202(85)(A)), contains a definition of "offering" that distinguishes "an offering by means of trading transactions" from other types of offerings. *Id.*, § 202(110)(B). Accordingly, as a simple matter of language, the term "public offering" may encompass not just the offering of new shares by an issuer to the public, but also the offering of already issued shares by their holders to the public by means of market trading, either on recognized exchanges or over-the-counter.

the 1933 and 1934 acts, "issuer" is defined in relevant part as "every person who issues or proposes to issue any security." 15 U.S.C. §§ 77b(4), 78c(a)(8). In the Investment Company Act, the definition is expanded to include: "every person who issues or proposes to issue any security, *or has outstanding any security which it has issued.*"[25] 15 U.S.C. § 80a-2(a)(22) (emphasis supplied).

Congress was well aware in 1940 of the basic operating differences between open-end and closed-end funds.[26] S. Rep. No. 1775 at 2-3, 86 Cong. Rec. 10071. Both types, however, suffered from the same basic abuse (*id.* at 7, 86 Cong. Rec. 10073):

> A major problem . . . is created by the absence of any legal requirement for adherence to any announced investment policies or purposes. Such policies have often been radically changed without the knowledge or prior consent of stockholders. Similarly, after investors have invested in companies on their faith in the reputation and standing of the existing managements, control of the public's funds has frequently been transferred without the prior knowledge or consent of stockholders to other persons who were subsequently guilty of gross mismanagement of the companies.

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[25] Commenting on this difference in definition, a leading treatise on the regulation of investment companies states (1 T. Frankel, *The Regulation of Money Managers: The Investment Company Act and the Investment Advisers Act* (Little, Brown, 1978), p. 209):

> In the 1940 Act, the issuer is identified with the investing public. In the 1933 Act, the issuer is identified with the sellers of securities to the investing public. The relevant fact is not that the issuer sells or issues securities, . . . but that it is the depository of the public investors' money.

[26] By their very nature, purchases and sales of shares in open-end funds involve the issue of new shares and redemption of previously issued shares, respectively. After their initial issue, shares of closed-end funds trade between investors in the same manner as shares of other corporations. Accordingly, open-end funds must be in continuous registration under the 1933 Act, and foreign open-end investment companies cannot sell their shares in the United States without complying with both the 1933 Act and the 1940 Act.

Congress also expressly recognized that the securities acts of 1933 and 1934 were "ineffective" to correct these problems, "first, because . . . publicity alone, which in general is the remedy provided by these acts, is insufficient to eliminate the abuses and deficiencies which exist in investment companies, and second, because a large number of such companies have never come under the purview of these acts." *Id.* at 11-12, 86 Cong. Rec. 10074.[27] See esp. 15 U.S.C. § 80a-13, relating to changes in investment policies.

With respect to the registration of investment companies, including foreign investment companies, the Senate report stated (*id.* at 13, 86 Cong. Rec. 10074):

> *Transactions by unregistered investment companies.* — Investment companies, unless registered as provided in the bill, are forbidden to conduct their activities through the use of the mails or instrumentalities of interstate commerce. Foreign investment companies may not register as investment companies or publicly offer securities of which they are the issuer in the United States unless the Commission finds that these foreign investment companies can be effectively subjected to the same type of regulation as domestic investment companies (sec. 7).

Giving the word "issuer" its defined meaning, the second sentence says that foreign closed-end funds may not publicly offer for redistribution in the United States any shares that they have outstanding regardless of when those shares were issued.

The First Circuit's position to the contrary is not only inconsistent with the underlying objectives of the act, but also has been rejected by the SEC.

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[27] Unless engaged in a new issue, closed-end companies did not file registration statements under the 1933 Act. Until the 1964 amendments to the Exchange Act, it applied only to securities listed on national securities exchanges. The over-the-counter markets remained unregulated. See L. Loss, *Fundamentals of Securities Regulation* (2d ed., Little, Brown, 1988), pp. 408-412.

The SEC has issued several no-action letters under § 7(d) to allow foreign investment companies to use the U. S. mails and other jurisdictional means in connection with public offerings of new shares outside the United States to non-U. S. persons, but always on the condition that the companies take effective measures to prevent the distribution *or redistribution* of these shares to U. S. persons.[28] See, *e.g.*, *G. T. Global Financial Services, Inc.*, CCH Fed. Sec. L. Rep. [1988-89 Trans. Binder], para. 78,842, p. 78,270. *Merrill Lynch & Co.*, CCH Fed. Sec. L. Rep. [1986-87 Trans. Binder], para. 78,323, p. 76,996 (no violation of § 7(d) provided that "offering is made to non-U. S. persons *and adequate procedures are established to preclude a redistribution to U. S. persons*") (emphasis supplied). *Shearson International Dollar Reserves*, CCH Fed. Sec. L. Rep. [1981-82 Trans. Binder], para. 77,034, p. 77,596 (same statement).

What is more, the SEC does not permit foreign closed-end investment companies to list previously issued shares — no matter how long ago they were originally issued — on American stock exchanges unless the company first registers under the Investment Company Act.

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[28] There is no language in the Investment Company Act limiting the scope of § 7(d) to public offerings in the United States. All the no-action letters cited are predicated on the explicit assumption that the language of § 7(d), literally applied, can be read to preclude foreign investment companies from using the U. S. mails or other U. S. jurisdictional means in connection with a public offering anywhere in the world.

[29] So far as the petitioner is aware, this SEC position is not disclosed in any publicly available source. However, the petitioner has been privately advised by counsel for and officers of foreign closed-end investment companies that the SEC has not allowed them to list their outstanding publicly traded shares in the United States simply by filing a Form 20-F under § 12(b) or (g) of the Exchange Act. The accuracy of these reports seems to be confirmed by the fact that so far as the petitioner is aware, there are currently no foreign closed-end investment companies listed in the United States but not registered under the Investment Company Act.

B. *The SEC's Paradoxical View of the Reach of Section 7(d), as Disclosed in this Case, Is Bad Policy at Odds with this Court's Recent Decisions under the Investment Company Act.*

Surprisingly, in view of its prior decisions and practices under § 7(d) (see *supra*, p. 27), the SEC's position on whether Goldcorp's redistribution of 5 million of its shares to some 2500 U. S. residents violated the Investment Company Act is unclear.[30]

The SEC now appears to have a paradoxical view of the scope § 7(d): a broad, literal one when a foreign closed-end investment company asks the SEC for a no-action letter, an exemption, or to register or list in the United States; and another somewhat narrower one when the SEC is asked to enforce the section against a foreign closed-end investment company that has unilaterally redistributed its shares in the United States.

Whatever bureaucratic considerations of convenience may support this odd and contradictory view, the effect is to put U. S. investors at the very peril from which § 7(d) was supposed to protect them.

In recent years, the SEC has discouraged foreign investment companies from registering under the Investment Company Act, and instead has urged them to establish separate "clone" funds in the United States. See ICA Release No. 8959 (1975), 17 CFR 271.8959; ICA Release No. 13691 (1983), 17 CFR 271.13691. Organized under the laws of a State, these clone

[30] In its briefs prior to argument, the SEC urged the First Circuit not to reach the issue. At oral argument, when pressed on this issue by the chief judge, the Commission's counsel declined to take a more specific position, but indicated that if the court decided to reach the issue, the SEC would like a further opportunity to brief it. By letter to the First Circuit after the argument, the SEC repeated its request for an opportunity to file a brief on the issue should the court decide to reach it. This request was effectively denied when the First Circuit decided the issue without requesting any further brief from the SEC.

funds may register just as any other domestic investment company, and do not require the SEC to deal with the problems typically presented by applications for registration under § 7(d), such as requests for certain exemptions under § 6(e) (A. 38a). This approach, besides being at odds with the Congressional policy embodied in §§ 6(e) and 7(d) (*i.e.*, to permit registration of foreign investment companies when consistent with "the public interest" and "the protection of investors"), also is inconsistent with recent decisions of this Court emphasizing that the Investment Company Act is a regulatory statute and is not intended to displace state (or foreign) corporate law not inconsistent with it. *Kamen* v. *Kemper Financial Services, Inc.*, 111 S.Ct. 1711, 1717 (1991). *Burks* v. *Lasker*, 441 U.S. 471, 478 (1979).

But what is worse, this approach, when combined with the SEC's apparent unwillingness as disclosed in this case to enforce § 7(d) against foreign closed-end investment companies that redistribute their shares in the United States, gives these very companies every incentive to play fast and loose with U. S. law. On the one hand, if they try to comply with § 7(d), they virtually have to reorganize under the laws of an American state. On the other, if they ignore it, they may redistribute their shares at will.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

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December 20, 1991

APPENDIX A

No. 91-1132

REGINALD H. HOWE,
Plaintiff, Appellant,

v.

GOLDCORP INVESTMENTS, LTD., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. DAVID S. NELSON, *U.S. District Judge*]
Before
Breyer, *Chief Judge*,
Bownes, *Senior Circuit Judge*,
and Stahl,* *District Judge*.

Reginald H. Howe, pro se.

Joseph A. Franco, Special Counsel, with whom *Thomas L. Riesenberg*; Assistant General Counsel, *Felicia H. Kung*, Attorney, Securities and Exchange Commission, and *Paul Gonson*, Solicitor, were on brief for Securities and Exchange Commission, amicus curiae.

Harvey J. Wolkoff with whom *David A. Martland, Robyn D. Gold, Ropes & Gray, John A.D. Gilmore* and *Hill & Barlow* were on brief for the Goldcorp and Dickenson appellees.

Brackett B. Denniston, III, Barbara Gruenthal, Sam A. Wilkins, III and *Goodwin, Procter & Hoar* on brief for appellees Tory, Tory, DesLauriers & Binnington, Charles F. Scott and James E.A. Turner.

September 27, 1991

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*Of the District of New Hampshire, sitting by designation.

BREYER, *Chief Judge*. The doctrine of *forum non conveniens* permits an American court to decline to exercise jurisdiction over a case when a foreign tribunal can more appropriately conduct the litigation. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 250 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 507-08 (1947). This appeal raises the important question of whether a federal court has the legal power to invoke the forum non conveniens doctrine in a private securities law action brought against a foreign company, its officers and other foreign defendants. The action rests upon conduct that took place primarily (but not entirely) outside the United States; the plaintiff alleges that this conduct violated several laws, including American securities laws forbidding misrepresentation. *See* 15 U.S.C. § 78j(b) (Exchange Act anti-fraud provision); 15 U.S.C. § 77q(a) (Securities Act anti-fraud provision).

We conclude that the federal courts possess the power to invoke the *forum non conveniens* doctrine in a private action claiming a violation of American anti-fraud securities statutes, as they do in cases brought under most other federal statutes. We hold that the case before us is an appropriate case in which to invoke the doctrine. And we conclude that the district court's dismissal of the case (in effect requiring the plaintiff to bring his case in Canada) was lawful.

I

Background

The plaintiff in this case, Reginald Howe, an American shareholder of Goldcorp, claims that defendants Goldcorp, its officers, its investment advisors, and its lawyers, all of whom are Canadians, violated securities statutes, primarily by failing to disclose adequately their intentions, plans, objectives and other circumstances related to their efforts to take over two other Canadian companies called Dickenson and Kam-Kotia.

He claims that, in these same circumstances, some of these defendants violated their fiduciary duties to Goldcorp or to its shareholders, and some, or all, of the defendants violated other statutes as well. The district court dismissed all of Mr. Howe's claims on grounds of *forum non conveniens*.

To understand the basis for our conclusion that the dismissal of the entire case was lawful, the reader must keep in mind background circumstances that involve complex relationships among three factors: (1) Goldcorp's contacts with the United States, (2) the basic circumstances out of which Mr. Howe's claims developed, and (3) Mr. Howe's several different, specific legal claims. We shall describe these matters briefly, drawing upon our reading of the complaint and its supporting affidavits. We shall also sometimes discuss the case as if it were against Goldcorp alone, when doing so simplifies our discussion. (When we do this, we believe our reasoning applies with equal or stronger force to Mr. Howe's claims against Goldcorp's officers and advisors.)

A. Goldcorp's Contacts with the United States.

The record indicates that Goldcorp's significant contacts with the United States are limited:

First, Goldcorp is a Canadian corporation. Its shares trade on Canadian stock exchanges where anyone can buy them. Goldcorp sells its shares to residents of the United States only if they (or their agents) buy those shares in Canada. Goldcorp shares do not trade on stock exchanges (nor are they sold over the counter) in the United States.

Second, Goldcorp sends annual reports, proxy statements and similar material to shareholders in whatever country they live. Thus, shareholders who live in the United States receive this material, sent as part of general, worldwide mailings.

Third, Goldcorp sends regular dividends to shareholders in whatever country they live. Shareholders who live in the United

States receive dividend payments from Goldcorp, but only as part of a general distribution to all shareholders. Goldcorp, at least once, issued rights to all of its shareholders entitling them to buy additional Goldcorp shares (at a special price); but Goldcorp did not distribute those rights to shareholders in the United States. Rather, it sold in Canada the rights of its American shareholders and sent them the proceeds of the sale.

Fourth, Goldcorp employees have answered, by mail or by phone, specific questions addressed to them by Goldcorp's shareholders in the United States. Goldcorp employees have, from time to time, sent annual reports and similar written material to investment advisors or stock brokers in the United States, always at the request of those advisors or brokers, who themselves (or who have clients who) were already Goldcorp shareholders. On at least one occasion, Goldcorp explained to a broker in the United States (who had asked Goldcorp) how that broker could buy a large block of shares on a Canadian exchange.

Fifth, in 1989 Goldcorp acquired two Canadian companies (called Dickenson and Kam-Kotia) which owned some assets in the United States and had some American shareholders. In doing so, it had to comply — and did comply with various United States Securities and Exchange Commission requirements.

Sixth, Goldcorp's American shareholders, including Mr. Howe, own about one-third of Goldcorp's shares.

B. The Basic Underlying Circumstances

Mr. Howe's allegations grow out of the following events:

1. Before 1987 Goldcorp was a company that owned gold and held other diverse, gold-related investments. Its articles of incorporation forbid it to own

more than 10 percent of the assets of any other single company or to invest more than 10 percent of its own assets in the shares of any other single company. Thus, investment in Goldcorp amounted to an investment approximately as safe as gold itself; for Goldcorp could itself own only (1) gold and (2) a small or diverse portfolio of other gold-related companies.

2. In 1987 Goldcorp asked its shareholders to approve changes in its articles of incorporation that would permit it to own more than 10 percent of other individual companies and to invest more than 10 percent of its own assets in a single company's shares. The stockholders gave their approval.
3. In January 1989 a Canadian company called Corona tried to take over two other Canadian goldmining companies (Dickenson and Kam-Kotia). Goldcorp, appearing (in Mr. Howe's words) as a "white knight," thwarted Corona's bid by taking over these two companies itself. Corona brought a lawsuit in Canada claiming that the Goldcorp takeover would violate a provision in Goldcorp's articles of incorporation (prohibiting Goldcorp from investing in a firm in which its financial advisors held more than a 5 percent interest), but Corona lost this lawsuit.
4. As a result of the takeovers of Dickenson and Kam-Kotia, the value of Goldcorp's shares declined dramatically.

C. The Legal Claims

Mr. Howe's complaint claims that facts surrounding Goldcorp's amendment of its articles of incorporation in 1987 and its 1989 takeover of Dickenson and Kam-Kotia reveal several kinds of unlawful activity. First, he says that Goldcorp

"defrauded" its shareholders, primarily by failing to explain adequately that the changes in its articles of incorporation meant a radical change in its investment policy. In particular, alleges Mr. Howe, Goldcorp failed to explain that the corporation would no longer invest its assets safely in gold and in a diversified portfolio, but, instead, would invest heavily in the shares of one or two companies, thereby greatly increasing the risks to investors in Goldcorp. This "misrepresentation" or "fraud," the complaint says, violates the federal securities laws, see 15 U.S.C. §§ 78j(b), 77q(a), Massachusetts consumer protection law, see Mass. Gen. L. ch. 93(a), and the common law of fraud and misrepresentation.

Second, the complaint claims another instance of "misrepresentation" or "fraud." It states that Goldcorp failed to disclose to the SEC (as part of its 1989 effort to buy shares of Dickenson and Kam-Kotia from United States shareholders) the existence of legal problems surrounding the 1987 amendment of its articles of incorporation. See 15 U.S.C. § 78n.

Third, the complaint says that officers of Goldcorp and Goldcorp's investment managers, when organizing the takeover of Dickenson and Kam-Kotia, tried to help themselves rather than to benefit Goldcorp. It says, for example, that, by improperly looking to their own financial gain, they violated fiduciary duties owed to the company — duties imposed by common law, Canadian law, securities statutes and the American Investment Company Act of 1940.

Fourth, the complaint says that these same misrepresentations and violations of fiduciary duty violated various federal criminal statutes, such as the anti-racketeering laws. See 18 U.S.C. §§ 1341 *et seq.*; 18 U.S.C. §§ 1961 *et seq.*

Fifth, the complaint says that Goldcorp should have "registered" with the SEC, under the Investment Company Act. See 15 U.S.C. § 80a-7.

The complaint asks for damages and it asks the district court to order Goldcorp to "register" with the SEC.

The district court, following the recommendation of a magistrate, dismissed Mr. Howe's complaint on grounds of *forum non conveniens*. Mr. Howe appeals this dismissal.

II

The Court's Legal Power to Invoke the Doctrine

The doctrine of *forum non conveniens*, apparently originating in nineteenth century Scottish law, *see Alcoa Steamship Co.* v. *M/V Nordic Regent*, 654 F.2d 147, 150 n.3 (2d Cir. 1980), permits a court to dismiss a case because the chosen forum (despite the presence of jurisdiction and venue) is so inconvenient that it would be unfair to conduct the litigation in that place. Dismissal has the practical effect of requiring the plaintiff to file his complaint in a more convenient forum elsewhere. The Supreme Court has held that the federal courts may invoke the doctrine. *Piper Aircraft*, 454 U.S. at 250; *Gilbert*, 330 U.S. at 507-08. The Court has stressed that the doctrine is "flexible," that its "contours" are not "rigid," and that, in applying it, courts are to take account of many "considerations" related to fairness and convenience. *See Piper Aircraft*, 454 U.S. at 249. For example, can the plaintiff bring his suit almost as easily elsewhere? How inconvenient, how oppressive might it be to force the defendant to appear in the initially chosen forum? Is the relation between the chosen forum and the lawsuit so attenuated that conducting the case in the chosen forum seems an "imposition" on the court? *See Gilbert*, 330 U.S. at 507-08.

Before 1948, when Congress enacted 28 U.S.C. § 1404(a) (permitting a "change of venue" between United States district courts for "the convenience of parties and witnesses"), federal courts invoked the doctrine of *forum non conveniens* to force transfer of a case domestically from one state or district to another *See Gilbert*, 330 U.S. 501 (dismissing case brought

in New York where Virginia was more convenient); 15 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3828 (2d ed. 1986). Since 1948, federal courts have relied on § 1404(a)'s *statutory* authority when transferring cases between domestic courts. They have had to use the non-statutory *forum non conveniens* doctrine only to bring about an *international* transfer of a case (from the United States to a foreign state) where plaintiffs may bring approximately the same action in the foreign forum, but without the unfairness and inconvenience that trying the case in this country would entail. The district court has invoked the doctrine for that reason in this case.

Appellant, first and most importantly, argues that (notwithstanding *general* Supreme Court authority to the contrary, *e.g., Piper Aircraft, supra*) *special* legal circumstances here deprive the district court of the legal power to employ the *forum non conveniens* doctrine *at all*. Supported by the SEC's amicus brief, he says that, no matter what the circumstances, no matter what the unfairness, a federal court (with jurisdiction and proper venue) lacks the power to invoke *forum non conveniens* if Congress has passed an applicable "*special*" venue statute, a statute that broadens the plaintiff's choice of forum beyond the choices that federal law's "general" venue statute otherwise would provide. The SEC's argument is highly technical, but its essential elements are these:

Venue statutes specify the subset of all federal courts with jurisdiction in which a plaintiff may bring a particular claim. In 1933 and 1934, the "*general* venue" statute (applicable to all federal cases) permitted a plaintiff to bring a case where the defendant was an "inhabitant" (for federal question cases) or a "resident" (for diversity jurisdiction cases). See Act of March 3, 1887, ch. 373, 24 Stat. 552 (current version at 28 U.S.C. § 1391); 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3802. *Special* venue provisions in the Secur-

ities Acts, however, then said that a securities law plaintiff also could bring a securities action in a federal court (with jurisdiction) wherever the "offer or sale took place" (or, in the case of the 1934 Act, "wherein any act or transaction constituting the violation occurred"). The fact that Congress enacted these "special venue" provisions (says the SEC in its amicus brief) means that Congress did not want the federal courts to apply the *forum non conveniens* doctrine at all; rather, Congress wanted to permit a plaintiff to bring a case wherever venue lay. Cf. *Gilbert*, 330 U.S. at 505 (discussing applicability of *forum non conveniens* doctrine under Federal Employers' Liability Act and its "special venue provisions").

The SEC adds that in 1948 the Supreme Court held that a federal court in California could not transfer an antitrust case (via *forum non conveniens*) to a more convenient federal forum in Illinois. *United States* v. *National City Lines*, 334 U.S. 573 (1948) ("*National City Lines I*"). The Court then said that Congress, in enacting a special venue statute in the antitrust laws, intended to give a plaintiff an absolute right to choose the forum; hence, the California court could not transfer the case, regardless of inconvenience or unfairness. This reasoning, says the SEC, applies here.

We do not find this argument convincing, for several reasons. First, the Court in *National City Lines I* relied heavily on the legislative history of the antitrust law's special venue statute. It found, in that history, especially strong reasons for believing Congress did not want to permit courts to transfer cases, irrespective of convenience. *National City Lines I*, 334 U.S. at 587, *citing* 51 Cong. Rec. 16274 (1914) (statement of Rep. Webb) ("we are liberalizing the procedure . . . in order to give the individual who is damaged the right to get his damages anywhere — anywhere you can catch the offender . . . . "); *id.* at 9417 (statement of Rep. Scott) ("I could not conceive that anything would deprive the plaintiff of his right

to choose the place of trial if he so desired . . . ."); *id.* at 9467 ("The amendment . . . permits suit to be brought, *with absolute discretion on the part of the plaintiff*, in any district where the defendant may have an agent . . . .") (emphasis added by the *National City Lines I* Court); *compare*, in respect to the Federal Employers' Liability Act, *Baltimore & Ohio R.R.* v. *Kepner*, 314 U.S. 44, 49, *citing* S. Rep. No. 432, 61st Cong., 2d Sess. 4 (1910) (remarks of Sen. Borah) (after "considering the deficiencies" of having left claims under the act subject to the general venue statute, Congress expanded venue with language that "must have been deliberately chosen to enable plaintiff . . . to find the corporation at any point or place or state where it is actually carrying on business, and there to lodge his action, if he chooses to do so.") and *Miles* v. *Illinois*, 315 U.S. 698, 703 (1943) (provision Congress adopted was designed to give "plaintiff the right to select the forum. . . .").

We have found no such unusual legislative history relevant to the Securities Acts' special venue statutes, however. And, we believe that difference is significant. After all, members of Congress enacting a special venue statute normally will not have thought about its potential effect upon transfers of cases to more convenient forums. *The language of such a statute does not forbid transfer.* It typically says nothing at all about case transfers. Its language simply adds to the number of courts *empowered* to hear a plaintiff's claim. As Justice Jackson pointed out in *Gulf Oil* v. *Gilbert*, "that the venue statutes of the United States . . . empower [a] court to entertain [an action] does not settle the question whether [that court] must do so." 330 U.S. at 504.

Indeed, in the international context one can ask, "What is so special about a special venue statute?" If a *general* venue statute opening federal court doors (say, in New York) is compatible with an international *forum non conveniens* transfer

(say, to Italy), why does a special venue statute which simply opens another court's doors (say, in California,) suddenly make the same international transfer unlawful? *Both* kinds of statutes open otherwise closed court doors. *Neither* kind of statute, explicitly or (absent some special legislative intent) implicitly, prohibits an international transfer. The distinction between "special" and "general" venue statutes is particularly difficult to maintain in light of congressional amendments to the "general" venue statute that have nearly erased the distinction between special and general. See 28 U.S.C. § 1391 (defining residence for corporations to include any place where the corporation has sufficient contacts to support jurisdiction); 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3802.

Second, immediately after the Supreme Court decided *National City Lines I*, Congress enacted a new statute, 28 U.S.C. § 1404(a), that explicitly permitted domestic transfers of cases to more convenient forums. And, the very next year the Supreme Court simply *overruled National City Lines I*. *United States* v. *National City Lines*, 337 U.S. 78, 84 (1949) ("*National City Lines II*"). The SEC points out that § 1404(a) applies only to domestic, not international, transfers, and it argues that *National City Lines I* continues to govern — and prohibit — the latter. *Compare Industrial Invest. Dev. Corp.* v. *Mitsui & Co.*, 671 F.2d 876 (5th Cir. 1982), *vacated*, 460 U.S. 1007 (1983) (antitrust case accepting this kind of argument); and *Kempe* v. *Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 279 (1989) (*citing Mitsui*) with *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127 (2d Cir. 1987) (rejecting the argument). But, the Court in *National City Lines I* considered only domestic transfers; it did not consider international transfers at all.

Moreover, § 1404(a) at the least reflects a congressional policy strongly favoring transfers. This removes whatever

temptation one otherwise might have to engage in the legal fiction that a different Congress, which never considered transfers at all and which wrote a venue statute that never mentioned them, somehow intended to take from the courts their long-established power to transfer a case when considerations of fairness and convenience so required. It is, therefore, not surprising that most case law in recent years has taken positions contrary to that which the SEC now urges upon us. *See Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d at 130 (*forum non conveniens* applicable in RICO cases notwithstanding special venue provision); *In re Aircrash Disaster Near New Orleans*, 821 F.2d 1147, 1163-64 (5th Cir. 1987) (*forum non conveniens* available under Jones Act notwithstanding special venue provision); *Cruz* v. *Maritime Co. of Philippines*, 702 F.2d 47, 47-48 (2d Cir. 1983) (same); *accord Gazis* v. *John S. Latsis, Inc.*, 729 F. Supp. 979, 987-88 (S.D.N.Y. 1990); *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 431 (9th Cir. 1977) (*forum non conveniens* applicable to Lanham Act notwithstanding special venue provision); *but see Mitsui*, 671 F.2d at 890-91 (antitrust special venue provision leaves no room for discretionary *forum non conveniens* dismissal); *Zipfel* v. *Halliburton Co.*, 832 F.2d 1477, 1483 (9th Cir. 1987), *cert. denied sub nom. Crowley Maritime Corp.* v. *Zipfel*, 486 U.S. 1054 (1988) (special venue provisions of Jones Act bars *forum non conveniens* application); *SEC* v. *Wimer*, 75 F. Supp. 955, 963-65 (W.D. Pa. 1948) (statement indicating that Securities Act special venue statute bars *forum non conveniens* dismissal); *Pioneer Properties, Inc.* v. *Martin*, 557 F. Supp. 1354, 1362 (D. Kan. 1983), *appeal dismissed*, 776 F.2d 888 (10th Cir. 1985) (somewhat similar language).

Third, we can find no good policy reason for reading the special venue provisions as if someone in Congress really intended them to remove the courts' legal power to invoke the doctrine of *forum non conveniens* in an otherwise appropriate

case. The growing interdependence of formerly separate national economies, the increased extent to which commerce is international, and the greater likelihood that an act performed in one country will affect citizens of another, all argue for expanded efforts to help the world's legal systems work together, in harmony, rather than at cross purposes. To insist that American courts hear cases where the balance of convenience and the interests of justice require that they be brought elsewhere will simply encourage an international forum-shopping that would increase the likelihood that decisions made in one country will cause (through lack of awareness or understanding) adverse effects in another, eroding uniformity or thwarting the aims of law and policy. And, to deprive American courts of their transfer power when, but only when, one of more than three hundred special venue statutes applies, would create a hodge-podge, that would, or would not, bring about American adjudication of an essentially foreign controversy, depending upon the pure happenstance of whether Congress — at some perhaps distant period and likely out of a desire to widen plaintiffs' venue choices in typical domestic cases — enacted a "special venue" provision. See 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3804 at 28 n.2 (citing ALI study listing some 330 venue provisions in sections of the United States Code not in Title 28). Such a result would seem thoroughly unsound.

For these reasons, we reject the SEC's argument that the courts never have power to dismiss a private securities law case on *forum non conveniens* grounds.

III

The Doctrine Applied

We turn to the appellant's second argument, also supported by the SEC, — that the district court misapplied the doctrine of *forum non conveniens* in the present case. We consider this

argument in light of several well-established legal principles. First, *forum non conveniens* is a flexible, practical doctrine designed to avoid trials in places so "inconvenient" that transfer is needed to avoid serious unfairness. *Piper Aircraft*, 454 U.S. at 259; *cf. Gilbert*, 330 U.S. at 507 (inconvenience must be serious to warrant transfer from plaintiff's chosen forum; plaintiff's choice of forum is to be disturbed only "rarely").

Second, although *forum non conveniens* is not "rigid," *Piper Aircraft*, 454 U.S. at 249, and "[each case turns on its facts," *id.* (quoting *Williams* v. *Green Bay & Western R. Co.*, 326 U.S. 549, 557 (1946), the Supreme Court has provided an illustrative list of relevant considerations: "Private interest" factors include "relative ease of access to sources of proof; availability of compulsory process;" comparative trial costs, ability to enforce a judgment, and so forth. "Public interest" factors include the practical difficulties of unnecessarily imposing upon a busy court (or citizens called to jury duty) the obligation to hear a case more fairly adjudicated elsewhere, as well as having a judge more familiar with relevant law make the requisite legal determinations. *See, e.g., Gilbert*, 330 U.S. at 508-09 (upholding decision to dismiss a negligence case brought in New York, because Virginia, where plaintiff lived, where the accident occurred, and where many witnesses and most of the evidence would be found, was a more convenient forum).

Third, the "*forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only where there has been a clear abuse of discretion: where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference." *Piper Aircraft*, 454 U.S. at 257 (upholding district court's dismissal of products liability suit, for reasons of convenience of trial, requiring transfer of the case from Pennsylvania to Scotland despite the

presence of Pennsylvania defendants and the likelihood that Scottish law was less favorable to plaintiffs); *cf. Mercier* v. *Sheraton Int'l Inc.*, 935 F.2d 419, 423, 430 (1st Cir. 1991) (reversing, for "abuse of discretion," district court dismissal on *forum non conveniens* grounds where district court erred in assessing key public interest factors and in finding foreign forum adequate).

We can find no "clear abuse" of the district court's powers in this case. For one thing, the balance of conveniences seems to favor, with unusual strength, the Canadian defendants. The relevant events surrounding both plaintiff's "misrepresentation" and "breach of fiduciary duty" claims took place in Canada, not in the United States. The Canadian directors of Goldcorp, its officers, its investment advisors, and its lawyers, meeting, speaking, planning, and acting *in Canada*, took (or failed to take) the actions that allegedly amounted to a failure to remain properly loyal to Goldcorp and its shareholders. Canadian individuals also decided, *in Canada*, precisely what statements they or the corporation should make, or should not make, in public descriptions of changes in Goldcorp's articles of incorporation, of changes in Goldcorp's investment policies, and of circumstances surrounding the takeover of Dickenson and Kam-Kotia. They presumably arranged to have printed *in Canada* most of the documents embodying most of those statements (though they then disseminated many of these documents to shareholders throughout the world). Thus, the relevant actions, statements and omissions that underlie the plaintiff's claims of "misrepresentation" or "fraud" originated in Canada. Most of the background facts that might show those statements or omissions to be materially false or misleading occurred in Canada.

Given these facts, it is not surprising that most of the evidence is in Canada and most of the witnesses are in Canada. Indeed, an undisputed affidavit by Goldcorp's President says

that, except for Mr. Howe, no resident of the United States "has knowledge relevant to the matters alleged in the amended complaint." And, only Canadian courts, not courts within the United States, have the legal power to compel the testimony of twelve Canadian potential witnesses who are not under the control of any party. *Cf. Pain* v. *United Technologies Corp.*, 637 F.2d 775, 786-88 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (where most of the documents and testimonial evidence were outside the United States and were "immune from the compulsory process of American courts," if "trial were to be conducted in the United States, the inability of both parties to obtain the full panoply of relevant . . . evidence would greatly hinder fair resolution of the dispute"); *Dahl* v. *United Technologies Corp.*, 632 F.2d 1027, 1030 (3d Cir. 1980) (same); *Schertenleib* v. *Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978) ("inability to bring [witnesses] here for live cross examination before a fact-finder" is "[perhaps the most significant problem" making adjudication in a United States court inappropriate); *Farmanfarmaian* v. *Gulf Oil Corp.*, 588 F.2d 880, 881 (2d Cir. 1978) (quoting district court opinion, that "evidence of the breach . . . [and major witnesses . . . [will most likely come from" a foreign country "weigh[s] heavily" in favor of declining jurisdiction on *forum non conveniens* grounds); *see also Piper Aircraft*, 454 U.S. at 258; *De Melo* v. *Lederle Laboratories, Div. of American Cyanamid Corp.*, 801 F.2d 1058, 1063 (8th Cir. 1986) ("It is of considerable importance . . . that litigation in the United States would deprive Lederle of compulsory process . . . .").

Compulsory process would seem especially important where, as here, fraud and subjective intent are elements of the claim, making the live testimony of witnesses for the purposes of presenting demeanor evidence essential to a fair trial. *See Schertenleib*, 589 F.2d at 1165 ("Since the crux of this litigation is the truth or falsity of . . . charges that plaintiff is a swindler,

to be able to take the alleged co-conspirators' testimony by letter rogatory only would be a very serious hardship"); *Fustok* v. *Banaue Populaire Suisse*, 546 F. Supp. 506, 510 n.10 (S.D.N.Y. 1982) (in a fraud action, availability of compulsory process in alternative forum is a factor favoring dismissal for *forum non conveniens*).

At the same time, trial in Canada will not deprive the plaintiff of relevant legal advantages. Canadian courts will either apply American law, see Restatement (Second) of Conflict of Laws § 6; *Canada Maltina Co.* v. *Paterson Steamship, Ltd.*, 285 U.S. 413, 424 (1932); or they will apply Canadian laws that offer shareholders somewhat similar protections by forbidding misrepresentation and fraud and imposing fiduciary obligations. See Securities Act, R.S.O. 1980, ch. 466, §§ 126-27 (liability for misrepresentation in offering or circular); *id.* 131-32 (liability for nondisclosure of material fact or change, for tipping, for insider trading); Business Corporations Act, S.O. 1982, ch. 4, §§ 134, 244-47 & 252 (director and officer standard of care; shareholders' remedies); Anisman Aff. at 10-11, 14-18.

We concede there may be some differences between Canadian and American law on these matters. Controlling precedent makes clear, however, that small differences in standards and procedural differences (such as greater difficulty in meeting class action requirements or less generous rules for recovering attorney's fees) are beside the point. *Piper Aircraft*, 454 U.S. at 254, 252 n.18 (the "possibility of an unfavorable change in law" is not even "relevant" unless "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all"). *See Kempe* v. *Ocean Drilling & Exploration Co.*, 876 F.2d at 1145 (absence of equivalent of RICO in foreign jurisdiction does not bar dismissal on grounds of *forum non conveniens* where foreign law permits recovery for fraud, negligence, breach of fiduciary duty and the like);

Dowling v. *Richardson-Merrell, Inc.*, 727 F.2d 608, 615 (6th Cir. 1984) (that "certain theories of tort recovery are not recognized" in the foreign jurisdiction does not make the "remedy provided by the alternative forum . . . clearly inadequate or unsatisfactory"); *Alcoa Steamship*, 654 F.2d at 159 (maximum recovery of $570,000 in foreign forum versus $8,000,000 in United States does not render foreign forum inadequate); *Fitzgerald* v. *Texaco, Inc.*, 521 F.2d 448, 453 (2d Cir. 1975) *cert. denied sub nom. Hapag-Lloyd, A.G.* v. *Texaco Panama, Inc.*, 423 U.S. 1052 (1976) (court has discretion to dismiss "even though the law applicable in the alternative forum may be less favorable to the plaintiff's chance of recovery"); *Fustok*, 546 F. Supp. at 513-14 ("even if the Swiss courts apply Swiss law rather than the Commodity Exchange Act, plaintiff is deprived of no right. . . . There can be no doubt that the allegations of fraud which are basic to plaintiff's claims are actionable under Swiss law").

Further, this case, except for the presence of an American shareholder, has little to do with Massachusetts or any other jurisdiction in the United States. Goldcorp's contacts with the United States consist of those listed earlier: (1) sending reports and statements to American shareholders among others, (2) answering questions sent by Americans about, how, for example, they might buy shares in Canada, (3) providing explanations of corporate policies and activities to American shareholders, such as Mr. Howe, who requested them, and (4) filing takeover information with the SEC so that Goldcorp could buy shares that Americans might hold in two Canadian companies (Dickenson and Kam-Kotia). In respect to Massachusetts, Goldcorp's activities apparently come down to keeping a mailing list of eight shareholders, sending those shareholders ordinary information, and answering requests for information from one firm of investment advisors (Shearson Lehman, to which Goldcorp sent ten annual, and ten interim, reports) and seven individuals.

Finally, this case has a great deal to do with Canada. The underlying circumstances involve actions of a Canadian corporation, its directors, officers and advisors. And the plaintiff's claims implicate duties the defendants owed to the corporation and its shareholders under Canadian law. Thus, at least some significant portion of the adjudication of Mr. Howe's case will involve tasks most easily and appropriately handled by a Canadian court: interpreting primarily Canadian law and applying it to matters principally of concern to Canada and Canadians. *See Piper Aircraft*, 454 U.S. at 260-61 (possibility that American court would have to apply Scottish law, and strong Scottish "local" interest in litigation over an aircrash in Scotland were among factors favoring *forum non conveniens* dismissal, and were not outweighed by loss of "incremental deterrence" due to elimination of one theory of recovery which trial in Scotland would entail).

Of course, as we said, Goldcorp has a significant number of American shareholders; Mr. Howe claims to represent a class of 2,500 American shareholders; and federal securities laws are designed to protect American investors from misrepresentation and fraud. But, neither Mr. Howe nor the SEC has provided us with any reason to believe those laws seek so strongly to protect Americans who bought their shares *abroad* from misrepresentations (or violations of fiduciary duty) primarily taking place *abroad* that a court may not require an American shareholder to bring his case abroad in a nation that offers its shareholders roughly equivalent legal protections. To hold the contrary here would, in effect, remove the court's *forum non conveniens* power in securities cases, raising the practical concerns we mentioned earlier. That is to say, we believe that a holding barring transfer would increase the risk that national legal systems will work to frustrate one another and would hinder efforts to promote greater coordination and harmony among them. *See* p. 18, *supra*.

In sum, in respect to Mr. Howe's basic claims involving misrepresentation and violations of fiduciary duties, We cannot say that the district court was clearly wrong in finding that the balance of conveniences favors suit in Canada and that litigation in Howe's chosen forum would likely prove both unfair and oppressive.

IV

The Investment Company Act Claim

Lastly, we turn to a different claim in Mr. Howe's complaint, an Investment Company Act claim. Mr. Howe says that, in respect to this claim, Canada offers him no similar legal protection and that the district court, therefore, should have permitted him to proceed on this claim in Massachusetts.

Mr. Howe's complaint says, in relevant part, that Goldcorp violated a provision of the Investment Company Act of 1940, which forbids a foreign investment company to

> use . . . the mails . . . directly or indirectly, to offer for sale, sell or deliver after sale, in connection with a public offering, any security of which the company is the issuer. (15 U.S.C. § 80a7 (d))

The Act qualifies this apparently absolute ban against foreign companies' publicly offering their shares for sale in the United States by authorizing the SEC to permit such sales under certain conditions. The Act says,

> Notwithstanding the provisions of this subsection . . . , the Commission is authorized, upon application by [a foreign] investment company . . . ; to issue a conditional or unconditional order permitting such company to register under this title and to make a public offering of its securities by use of the mails

> . . . if the Commission finds that . . . it is both legally and practically feasible effectively to enforce the provisions of this subchapter [imposing special obligations such as registering the securities it issues, maintaining adequate financial records, and fulfilling fiduciary duties] against such company and that the issuance of such order is otherwise consistent with the public interest and protection of investors. (*Id.*)

Mr. Howe complains that, because Goldcorp did not "register," it violated the Act. He seeks both damages and a court order requiring Goldcorp to "register" with the SEC.

We believe, however, that the district court could properly dismiss this claim along with the others, for we do not see how the Act could entitle Mr. Howe to any relief beyond that which he would obtain simply by prevailing on the other claims in his complaint. Mr. Howe asks for damages, but how could violation of this particular section of the Act (dealing with registration) have damaged him? One can imagine a far-fetched theory, namely (1) that the Act required Goldcorp to register; (2) that, had Goldcorp registered, the SEC (or perhaps buyers) would have found it easier to force the corporation to comply with "fiduciary duty" obligations (and structural obligations designed to secure fulfillment of fiduciary duties) which the Act imposes; and 3) that Goldcorp's failure to comply with those substantive provisions enabled its officers and others to betray the corporation and its shareholders. But, damages on such a theory would require Mr. Howe to show that some of the defendants violated fiduciary duty obligations; and a showing of violation of fiduciary duty obligations would entitle Mr. Howe to damages in Canada on the basis of other theories in the complaint. As we have said, whether or not Canada's substantive law in respect to fiduciary duty is identical to

American law is, under well-established, controlling legal authority, beside the point. See pp. [17a-18a], *supra*. *Cf.* Business Corporations Act, S.O. 1982, ch. 4 §§ 134, 247, 252 (provisions, in Canadian statutes, similar to the Investment Company Act of 1940); 15 U.S.C. § 80a-35. We are not surprised that, at oral argument, Mr. Howe very honestly said that the addition of his Investment Company Act claims did not "in substance" make a significant difference, for, in respect to damages, it seems but a longer and more tortuous road leading to the same Rome.

Mr. Howe's complaint also seeks a court order compelling Goldcorp to register under the Investment Company Act. We do not understand, however, how the law could entitle him to this relief. Assuming, purely for the sake of argument, that the Investment Company Act somehow applies to Goldcorp at all and, assuming further, that a court could grant injunctive relief under the Act at a private plaintiff's request, *but see Krome* v. *Merrill Lynch & Co., Inc.*, 637 F. Supp. 910, 918 (S.D.N.Y. 1986) (private Investment Act plaintiff cannot obtaian injunctive relief); *M.J. Whitman G Co. Pension Plan* v. *American Financial Enterprises, Inc.*, 552 F. Supp. 17, 22 (S.D. Ohio 1982), aff'd, 725 F.2d 394 (6th Cir. 1984) (same), an order requiring registration could not constitute proper relief here. The Act does not compel *registration*. Rather, the Act *forbids* a *public offering* without (1) registration and (2) SEC approval. An order compelling registration alone would not normally bring a firm into compliance with the Act. To achieve compliance with these particular provisions of the Act, a court would normally have to enjoin a public offering, until the offeror both registered and received SEC approval.

Indeed, the relevant provisions of the Investment Company Act focus directly upon an investment company's "public offerings." Once one understands this, the statutory provisions on which Mr. Howe relies seem to have next to nothing to do

with this case. Mr. Howe's complaint not only does not ask for an injunction forbidding a "public offering"; it does not even claim that Goldcorp ever made or intended to make a "public offering" in the United States. The SEC has suggested that we might permit Mr. Howe to amend his complaint in this respect. But we have not found anywhere in the voluminous documents before us any alleged facts that make it seem likely Mr. Howe could prove the existence of a "public offering." *See Santa Barbara Securities*, SEC No-Action Letter, Ref. No. 82-350-CC (Apr. 8, 1983) (describing SEC's "general" interpretation of the term "public offering" in 3(c)(1) of the Investment Company Act as consistent with the term's meaning in § 4(2) of the 1933 Act); *United States* v. *Naftalin*, 441 U.S. 768, 777-78 (1979) (excluding, from the definition of "public offering" in the 1933 Act, activities in connection with "redistributions" and sales in "aftermarkets"). Consequently, we do not believe it practical or fair to insist that the separate claim proceed in the Massachusetts court. To allow Mr. Howe to use this claim as a basis for keeping his entire case in Massachusetts would permit a very small, and defective, tail to wag a very large dog.

All this is to say that, in respect to the Investment Company Act claim, we do not see how the complaint could entitle Mr. Howe to the relief he seeks, nor do we see any significant practical likelihood that amending the complaint would make a difference. Hence, the presence in the complaint of the Investment Company Act claim does not compel reversal of the district court's dismissal.

In sum, reading Mr. Howe's complaint as strongly in his favor as the record permits, we find that the district court acted lawfully when it dismissed his claims against all the defendants in this case on the grounds of *forum non conveniens*. Since the ultimate judgment in this case is dismissal, we need not consider other arguments, made by individual defendants, that

the law requires dismissal for other reasons as well, such as lack off personal jurisdiction.

The judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

REGINALD H. HOWE, Plaintiff,	)	
v.	)	CIVIL ACTION
GOLDCORP INVESTMENTS Ltd. *et al.*, Defendants.	)	NO. 89-1248-N

NELSON, D.J. January 9, 1991

MEMORANDUM AND ORDER

Plaintiff, pursuant to Rule 3(b) of the Rules for Magistrates in the United States District Court for the District of Massachusetts and Rule 72(b) of the Federal Rules of Civil Procedure, objects to the FINDINGS AND RECOMMENDATIONS ON DEFENDANTS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS* dated August 20, 1990 (the "Findings"). After *de novo* review of Plaintiff's objections, this Court adopts the Findings and dismisses Plaintiff's action on grounds of *forum non conveniens*. However, since one of Plaintiff's objection raises an issue not directly addressed in the Findings, this Court issues this Memorandum and Order to discuss that point.

I ISSUE

The central issue raised by Plaintiff's objection is whether a district court can utilize the doctrine of *forum non conveniens* to dismiss a cause of action under a statute that has a "special venue" provision.

II BACKGROUND

The pertinent facts are these. Plaintiff is a shareholder in Goldcorp Investments Ltd. ("Goldcorp"), an investment company that invests in the securities of companies engaged in the development and operation of gold mines and gold bullion.

Plaintiff, in short, alleges that Goldcorp violated section 10b of the Securities and Exchange Act of 1934 (the "Exchange Act") when it failed to inform all of the voting shareholders of the potential effects of a vote to remove certain restrictions in Goldcorp's by-laws. On May 4, 1987, the shareholders voted to remove the restrictions (the "Restrictions") which prevented Goldcorp's from acquiring more than 10% of the stock of any one corporation.

With the restriction lifted Goldcorp made tender offers for, and successfully acquired large blocks of stocks of two mining corporations, Dickenson Mines Ltd., ("Dickenson") and Kam-Kotia Mines Ltd., ("Kam-Kotia"). As a result of these acquisitions, however, value of the Goldcorp stock declined.

Plaintiff instituted this suit to recover on behalf of the class of shareholders for damages caused by the alleged misrepresentations concerning the purpose and effect of the removal of the Restrictions, and for the damages caused by the directors of Goldcorp who improperly managed Goldcorp and allegedly transformed the investment company into an operating company.

The defendants, twelve individuals and seven corporations, the majority of the shareholders in Goldcorp, as well as important third-party witnesses, are all citizens of, and located in, Canada. The third-party witnesses, which defendants claim are crucial to their case, are not subject to process in the district courts of America.

III DISCUSSION

A. Magistrate Alexander's Recommendation of Dismissal On The Grounds of Forum Non Conveniens

In her Findings, Magistrate Alexander thoroughly examines the facts of the instant case and determines that, under the guidelines laid down by the Supreme Court, the instant case should be dismissed on grounds of *forum non conveniens*. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 (1981).

This Court finds, and Plaintiff does not dispute, that the magistrate's report establishes adequate grounds for dismissal under *forum non conveniens*. The issue left for decision is whether the doctrine of *forum non conveniens* is made inapplicable by the "special venue" provision of the Exchange Act.

B. Plaintiff's Objection and Arguments

Plaintiff objects to the magistrates application of forum non conveniens to this case. Plaintiff argues that

> "[the] statutes [which comprise the Exchange Act] are expressly intended to protect American investors, and particularly investors in investment companies as defined under the Investment Company Act, from various forms of securities fraud and other abusive practices. There is no precedent, and neither the magistrate nor the defendants have cited any, for using the doctrine of *forum non conveniens* to deny to American investors protection otherwise available to them under the antifraud provisions of the federal securities laws." PLAINTIFF'S OBJECTIONS TO FINDINGS AND RULINGS OF MAGISTRATE ON DEFENDANTS' MOTION TO DISMISS FOR *FORUM NON CONVENIENS* ("Objections") at 2.

Plaintiff cites *Pioneer Properties, Inc.* v. *Martin*, 557 F. Supp. 1354, 1362 (D. Kan. 1983), for the proposition that *forum non conveniens* should not be used to defeat the intent of Congress as expressed in the liberal venue provisions of the federal securities law.

In essence, Plaintiff argues that in creating the Exchange Act, Congress intended to protect American investors. This intent is expressed in the special venue provision which prevents the courts from frustrating that intent. Therefore, Plaintiff concludes, a court cannot dismiss a case alleging Exchange Act violation on grounds of *forum non conveniens*.

C. Special Venue Provisions and the Doctrine of Forum Non Conveniens

The presence of a special venue provision, without more, does not prevent a court form utilizing the doctrine of *forum non conveniens*. Federal courts have dismissed, on *forum non conveniens* grounds, cases brought under statutes that contain special venue provisions. *Kempe* v. *Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1144-45 (5th Cir.), *cert. denied*, 110 S. Ct. 279, 107 L. Ed. 2d 259 (1989); *Transunion Corp.* v. *Pepsico, Inc.*, 811 F.2d 127, 129 (2d Cir. 1987). This Court now must decide whether the special venue provision of the Exchange Act prevents it from dismissing the instant case on the grounds of *forum non conveniens*.

D. Case Law

It is now settled case law that the federal courts have inherent power to dismiss complaints on the ground of *forum non conveniens*. *Ferguson* v. *Ford Motor Co.*, 77 F. Supp. 425, 429 (S.D.N.Y. 1948); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 504 (1947). This doctrine allows a court to dismiss a suit "when an alternative forum has jurisdiction to hear the case, and

when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to a plaintiff's convenience,' or when the 'chosen forum [is] appropriate because of considerations affecting the court's own administrative and legal problems.' " *Gulf Oil Corp.*, at 241 (*citing Koster* v. *Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)).

In her Findings, the magistrate detailed how the facts of this case meet all the guidelines required for dismissal under *forum non conveniens*. As stated above, this Court adopts these findings.

Pioneer Properties, the case cited by Plaintiff, states that "[w]here the purposes of legislation, together with special venue provisions, indicate [the] intent [of Congress to allow the plaintiff broad power over the choice of forum], the court should not override the legislative purpose by resort to its discretionary powers under *forum non conveniens*." *Pioneer Properties*, 557 F. Supp. at 1362. The court in *Pioneer Properties* bases this ruling on *SEC* v. *Wimer*, 75 F. Supp. 955 (W.D. Pa. 1948), which holds that the doctrine of *forum non conveniens* is inapplicable to actions brought under the Exchange Act. *Pioneer Properties*, 557 F. Supp. at 1362.

Ferguson v. *Ford Motor Co.*, a case decided shortly after *Wimer*, however, discusses special venue statutes and appears to be the better reasoned case. *Ferguson* v. *Ford Motor Co.*, 77 F. Supp. 425 (S.D.N.Y. 1948) (holding that the special venue provisions of the Sherman Anti-trust Act make it immune from the doctrine of *forum non conveniens*). *Ferguson* reaches its conclusion only after a searching examination of the cases in which the Supreme Court and other courts have ruled on this issue. After its examination the *Ferguson* court concluded that the presence of a special venue provision, alone, will not immunize a statute from *forum non conveniens*. If it were the case that all statutes with special venue provisions were exempt

from *forum non conveniens*, the doctrine would be emasculated. *Ferguson*, 77 F. Supp. at 430.

The *Ferguson* court reasoned that when there is both a special venue provision, and when there is express intent on the part of Congress to make a statute immune from the doctrine of *forum non conveniens*, then the statute will be immune from the doctrine. *Ferguson* holds that it is necessary to look at the legislative history of a special venue statute to determine whether Congress intended to immunize it from the doctrine of *forum non conveniens*. *Id.*

This Court believes that there must be some indication by Congress, whether on the face of the statute itself, in the legislative history, or via some other reliable source, to show that it intended to make the Exchange Act immune from the effect of *forum non conveniens*. Since neither the Plaintiff nor the cases relied upon by Plaintiff, have provided any such indication, and since this Court can find none, this Court must conclude that it was not the intent of Congress to make the Exchange Act immune from the doctrine of *forum non conveniens*.

Further, this Court is not alone in holding that the Exchange Act is not immune from the doctrine of *forum non conveniens*. Other courts have reasoned that *forum non conveniens* does apply to private suits under the Exchange Act if the action can be brought in the alternative forum. *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 209 n.5 (2d Cir.) *modified on other grounds*, 405 F.2d 215 (2d Cir. 1968) (*en banc*); *Fustok* v. *Banque Populaire Suisse*, 546 F. Supp. 506, 514 (S.D.N.Y. 1982).

For the foregoing reasons, this Court ADOPTS the Findings of Magistrate Alexander and DISMISSES the instant case on grounds of *forum non conveniens*.

SO ORDERED.

/s/ David S. Nelson
David S. Nelson
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

REGINALD H. HOWE,
Plaintiff,

v.

CIVIL ACTION
NO. 89-1248-N

GOLDCORP INVESTMENTS LTD., ET AL.,
Defendants

FINDINGS AND RECOMMENDATION
ON
DEFENDANTS' MOTION TO DISMISS
FOR FORUM NON CONVENIENS

August 20, 1990

ALEXANDER, M.

This case is before this Court pursuant to a motion to dismiss under Fed. R. Civ. P. 12(b) (1) for *forum non conveniens* filed by the defendants, six Canadian corporations, one Canadian partnership and twelve Canadian citizens. The defendants contend that this lawsuit should be dismissed because it involves a Canadian dispute. The plaintiff, Reginald Howe, an American citizen and Massachusetts resident, who commenced this action individually and on behalf of a class of similarly injured shareholders, opposes the defendants' motion.

The plaintiff's complaint, filed on June 8, 1989, arises out of a 1987 vote by shareholders of defendant Goldcorp Invest-

ments Ltd. ("Goldcorp") to delete certain investment restrictions from Goldcorp's articles of incorporation, and also out of Goldcorp's 1989 acquisition of two other Canadian companies — Dickerson Mines, Ltd. ("Dickerson") and Kam-Kotia Ltd. ("Kam-Kotia").[1] Goldcorp is an investment holding company which invests its assets in gold related investments. The plaintiff essentially alleges that Goldcorp's directors breached their fiduciary duties to Goldcorp's public shareholders,[2] thereby causing Goldcorp's shares to decline and damaging the plaintiff who previously owned 10,000 Goldcorp shares. The plaintiff's principle claims include violations of the Investment Company Act of 1940, 15 U.S.C. §§ 80, *et seq.*; the Securities Exchange Act of 1934, 15 U.S.C. §§ 10(b)(5) and 14(e); the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*; the Securities Act of 1933, 15 U.S.C. § 17(a); federal mail and wire fraud law; aiding and abetting; misrepresentation; breach of fiduciary duty; Massachusetts Consumer Protection Act, Mass. Gen. L. ch. 93A; and finally, the Ontario Business Corporations Act.

The sole issue before this Court is whether the defendants' motion to dismiss on *forum non conveniens* grounds should be allowed. After consideration of the parties' memoranda of law and supporting affidavits, oral arguments of counsel and analysis of the pertinent case law, this Court concludes that the defendants' motion-to dismiss on *forum non conveniens* grounds should be allowed because Canada is the appropriate forum for this lawsuit.

A trial court's primary source of guidance in deciding a *forum non conveniens* motion was set forth by the Supreme

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[1] Corona Corporation, a rival bidder for Dickerson and Kam-Kotia, commenced an action in the Supreme Court of Ontario against Goldcorp and other defendants in this action making claims similar to the claims made by the plaintiff in this case.

[2] Approximately seventy-two percent of Goldcorp's registered shareholders have Canadian addresses.

Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). Although a plaintiff 's choice of forum should rarely be disturbed, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 241, a federal court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 507. In deciding whether to dismiss an action on *forum non conveniens* grounds a court must first decide whether an available and adequate forum exists. If the court decides that the foreign forum is both available and adequate, it must then balance "private interest factors" affecting the convenience 'of the litigant, and "public interest factors" affecting the convenience of the forum. *See Gulf Oil Corp.* v. *Gilbert*, 330 U.S. at 508-509. Factors pertaining to the private interests of the litigant include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if a view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious and inexpensive. *Id.* at 508. The public interest factors include administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the state law that must govern the case; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. *Id.* at 508-509; *Piper Aircraft Co.* v. *Reyno*, 454 U.S. at 241 n. 6. In addition, in *Piper*, the Supreme Court ruled that a plaintiff may not defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substitute law that would be applied in the alternative forum is less favorable to the plaintiff than that of the chosen forum.

Piper Aircraft Co. v. *Reyno*, 454 U.S. at 247. The possibility of an unfavorable change in the law is merely a factor to be considered, but that ordinarily this factor should not be given conclusive or even substantial weight in the forum inquiry. *Id.* at 251. The Supreme Court elucidated that in certain cases where the alternative forum could provide no remedy whatsoever — an unfavorable change in the law could be given substantial weight. *Id.* at 245-255. The Court now turns to an application of these principles to th e facts of this case.

First, this Court finds that the Courts of Canada provide an alternate and adequate forum for the resolution of the plaintiff's claims. Canadian law provides rights and remedies generally analogous to the statutory and common law provisions upon which the plaintiff rests his amended complaint.

The plaintiff claims that Canadian securities law, class action remedies, and liability for attorney's fees are dissimilar to United States laws, and that Canada does not allow contingency fees for plaintiff's in securities cases. The defendants declare that Canadian law provides rights and remedies generally analogous to the statutory and common law provisions upon which plaintiff rests his amended complaint. To support their affirmation, the defendants cite specific Canadian statutes and submitted affidavits from, what appear to be, prominent legal Canadian scholars. The plaintiff did not dispute these affidavits.

Dissimilarities between Canadian and United States securities law, class action remedies and liability for attorney's fees are not a sufficient reason for denying a motion to dismiss on *forum non conveniens* grounds. *See Piper Aircraft Corp.* v. *Reyno*, 454 U.S at 247-255 (dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff). In addition, the Canadian forum is adequate even though the plaintiff may not enjoy the same benefits he would receive in

an American Court. *Cf. Kempe* v. *Ocean Drilling & Exploration*, 876 F.2d 1138, 1145-1146 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 279 (1989) ("Although a RICO cause of action is not available in Bermuda, a forum is inadequate only where it would afford a plaintiff no remedy at all." *Id.* at 1146).

Next, in balancing the private interest factors against the public interest factors, this Court finds that the balance tips strongly in favor of the defendants and therefore, this case should be dismissed on *forum non conveniens* grounds.

In analyzing the private interest factors, the Court finds that this case involves a Canadian dispute. The defendants, composed of nineteen corporations and individuals, are Canadian. Although the plaintiff is a United States citizen residing in Massachusetts, the majority of the proposed class reside in Canada. The plaintiff cannot expect this Court to defer automatically to his forum choice merely because he is a United States citizen living in Massachusetts. *See Pain* v. *United Technologies Corp.*, 637 F.2d 775 (D.C.Cir. 1980) (dismissed on *forum non grounds* though one of the plaintiffs was a United States citizen), *Alcoa Steamship Co., Inc.* v. *M/V Nordic Regent*, 654 F.2d 147 (2d Cir. 1981) (dismissed on *forum non grounds* even though plaintiff corporation located and principal place of business in United States).

Next, allowing the case to proceed in Massachusetts will substantially inconvenience and disadvantage the defendants. It appears that virtually all relevant documents are located in Canada and these documents would be voluminous and difficult to transport. Similarly, all relevant witnesses are also located in Canada, including at least eight, identified and apparently critical third party witnesses with knowledge relevant to this lawsuit. The inability to compel these witnesses to testify could seriously prejudice the defendants. Moreover, the plaintiff does not dispute that compulsory process is not available to compel the testimony of these individuals at trial in the United States.

See Fed. R. Civ. P. 45(e)(1); *see also In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India, in December 1984*, 809 F.2d 195 (2d Cir. 1987) (improper for United States court to order parties to follow the Federal Rules of Civil Procedure in India).

After examining the public interest factors, it is perspicuously clear that Canada has a greater interest in deciding this controversy in Canada than the United states does in having the case decided here. This action raises issues of concern to Canada regarding the internal workings of Canadian corporations, the trading of stock on Canadian exchanges and the takeover of Canadian Corporations by other Canadian companies. In contrast, Massachusetts interest in this dispute is tangential. Although Massachusetts has a localized interest in protecting its citizens, the plaintiff appears to be the only class action plaintiff residing in Massachusetts. Again, all of the defendants are Canadian, five of them Canadian companies, and the majority of the proposed class of plaintiffs reside in Canada The events at issue occurred in Canada, and Canadian laws regulate these alleged events. In addition, another lawsuit, involving several of the defendants, the acquisition of Dickerson and Kam-Kotia, and many of the issues raised in the present case, is ongoing in Canada.

Finally, this Court does not want to burden its already congested docket with a case which will pose conflict of laws problems and burden citizens of Massachusetts with jury duty when Massachusetts has substantially less relation to this litigation than Canada. In summary, this case does not have a sufficient nexus with Massachusetts sufficient to justify this forums' commitment of judicial time and resources. *See Pain v. United Technologies Corp.*, 637 F.2d at 791.

Accordingly, this Court recommends that the defendants' motion to dismiss on *forum non conveniens* grounds be allowed.

/s/ Joyce L. Alexander
UNITED STATES MAGISTRATE

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. *See United States* v. *Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States* v. *Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *see also, Thomas* v. *Arn*, 474 U.S. 140 (1985).

APPENDIX D

SECURITIES EXCHANGE ACT OF 1934,
SECTION 12(g), 15 U.S.C. § 781(g):

(g)(1) Every issuer which is engaged in interstate commerce, or in a business affecting interstate commerce, or whose securities are traded by use of the mails or any means or instrumentality of interstate commerce shall —

> (A) within one hundred and twenty days after the last day of its first fiscal year ended after July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more personsl and
>
> (B) within one hundred and twenty days after the last day of its first fiscal year ended after two years from July 1, 1964, on which the issuer has total assets exceeding $1,000,000 and a class of equity security (other than an exempted security) held of record by five hundred or more but less than seven hundred and fifty persons.

register such security by filing with the Commission a registration statement (and such copies thereof as the Commission may require) with respect to such security containing such information and documents as the Commission may specify comparable to that which is required in an application to register a security pursuant to subsection (b) of this section. Each such registration statement shall become effective sixty days after filing with the Commission or within such shorter period as the Commission may direct. Until such registration statement becomes effective it shall not be deemed filed for the purposes of section 78r of this title. Any issuer may register any class

of equity security not required to be registered by filing a registration statement pursuant to the provisions of this paragraph. The Commission is authorized to extend the date upon which any issuer or class of issuers is required to register a security pursuant to the provisions of this paragraph.

(2) The provisions of this subsection shall not apply in respect of—

(A) any security listed and registered on a national securities exchange.

(B) any security issued by an investment company registered pursuant to section 80a-8 of this title.

* * *

(3) The Commission may by rules or regulations or, on its own motion, after notice and opportunity for hearing, by order, exempt from this subsection any security of a foreign issuer, including any certificate of deposit for such a security, if the Commission finds that such exemption is in the public interest and is consistent with the protection of investors.

* * *

SECURITIES EXCHANGE ACT OF 1934,
SECTION 27, 15 U.S.C. § 78aa:

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiciton of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constitu-

ting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found.

* * *

INVESTMENT COMPANY ACT OF 1940,
SECTION 6(e), 15 U.S.C. § 80a-6(e):

(e) If, in connection with any rule, regulation, or order under this section exempting any investment company from any provision of section 7, the Commission deems it necessary or appropriate in the public interest or for the protection of investors that certain specified provisions of this title pertaining to registered investment companies shall be applicable in respect of such company, the provisions so specified shall apply to such company, and to other persons in their transactions and relations with such company, as though such company were a registered investment company.

INVESTMENT COMPANY ACT OF 1940,
SECTION 7(d), 15 U.S.C. § 80a-7(d):

Sec. 7. (d) No investment company, unless organized or otherwise created under the laws of the United States or of a State, . . . shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to offer for sale, sell, or deliver after sale, in connection with

a public offering, any such security of which such company is the issuer. Notwithstanding the provisions of this subsection and of section 8(a), the Commission is authorized, upon application by an investment company organized or otherwise created under the laws of a foreign country, to issue a conditional or unconditional order permitting such company to register under this title and to make a public offering of its securities by use of the mails and means or instrumentalities of interstate commerce, if the Commission finds that, by reason of special circumstances or arrangements, it is both legally and practically feasible effectively to enforce the provisions of this title against such company and that the issuance of such order is otherwise consistent with the public interest and the protection of investors.

INVESTMENT COMPANY ACT OF 1940,
SECTION 44, 15 U.S.C. § 80a-43:

The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. A criminal proceeding based upon a violation of section 34, or upon a failure to file a report or other document required to be filed under this title, may be brought in the district wherein the defendant is an inhabitant or maintains his principal office or place of business. Any suit or action to enforce any liability or duty created by,

or to enjoin any violation of, this title or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found.

* * *